Supreme Court, U. S.
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80-520

No.

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1980

MICHAEL F. JARVILL, KENNETH LICHTY, and GREAT WESTERN SCHISM, INC.,

Petitioners,

v.

THE CITY OF EUGENE, et al,

Respondents.

* * * * * * * * * * * * * * * * * *

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

* * * * * * * * * * * * * * * * * *

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I. Questions Presented for Review.

A. May a city levy a special tax on a geographical sub area of the city without the consent of the persons taxed?

B. May a city levy a special tax and penalties on a particular class of persons where all others in the city are not similarly taxed and penalized and the direct benefits of the tax inure entirely to those persons not taxed?

The parties in this matter and the consolidated cases are:

IN THE COURT OF APPEALS OF THE STATE OF OREGON

Trial Court No. 74-2507

MICHAEL F. JARVILL,

Plaintiff-Appellant,

vs.

THE CITY OF EUGENE, et al.,

Defendants-Respondents.

Trial Court No. 74-2508

KENNETH LICHTY,

Plaintiff-Appellant,

vs.

THE CITY OF EUGENE, et al.,

Defendants-Respondents.

Trial Court No. 74-3369

CITY OF EUGENE, a Municipal corporation of the State of Oregon,

Plaintiff-Respondent,

vs.

GREAT WESTERN SCHISM, INC.,

Defendant-Appellant.

Opinions of the courts below are found at:

Michael F. Jarvill v. City of Eugene, 74-2507 (Cir.Ct.Or. [Lane County] filed April 26, 1977)

Jarvill v. City of Eugene, 40 Or App 185, 594 P2d 1261 (1979)

Jarvill v. City of Eugene, 289 Or 157, ___ P2d ___ (1980)

II. Grounds for Jurisdiction.

The Supreme Court of the State of Oregon entered an opinion in this matter on May 28, 1980. The Supreme Court denied Petitioner's Petition for Rehearing in this matter on July 2, 1980. Jurisdiction of this matter is conferred on the court by 28 U.S.C. §1257(3).

III. Constitutional Provisions, Statutes and Ordinances.

(See Appendix)

IV. Statement of the Case.

On May 31, 1972, the Common Council of the City of Eugene added section 2.380 to the Eugene Code which established a Downtown Development District and set forth its boundaries. On June 15, 1972, the Common Council of the City of Eugene added section 2.381 to 2.390 to the

Eugene Code which established a Downtown Development Board and defined its membership, terms of office, duties, proceedings and other functions.

On July 19, 1973, the Common Council of the City of Eugene submitted to the voters the following: A measure authorizing the levy of taxes for general operating purposes in excess of its tax base for the fiscal year beginning July 1, 1973; a charter amendment authorizing the Common Council to create a Downtown Development District with the powers to change its boundaries from time to time and to tax persons, property and economic enterprises in the district and to establish one or more agencies to assist the city in the exercise of those powers; and a measure authorizing the Common Council to levy a tax in the amount of

approximately $130,000 in excess of its tax base on real property in the Downtown Development District for the establishment of free parking of motor vehicles in that same area for the fiscal year beginning July 1, 1973, and ending June 30, 1974. All of the measures were approved.

On August 13, 1973, the Common Council of Eugene adopted Ordinance 16904 which added the following sections to the Eugene Code:

Section 3.700, entitled the Downtown Development District tax levy, imposed a tax on each professional who is not exempt under state law from municipal taxation a tax of $40 for each quarter that that person is engaged in a profession and a tax of $40 for each natural person whom he or she employed during part or all of that quarter as a

professional employe. This tax is imposed upon professional who are members of a partnership, association or corporation just as if they were individual proprietors. This section also imposes a tax on the gross sales or receipts of each nonprofessional person who engages in business in the Downtown Development District at the rate of $2.50 per $1,000 of gross retail sales and receipts. The rest of the subsections provide for the dates of payment and provide for a means by which a person can express his grievance if he feels that his classification is wrong.

Section 3.705 was added to the Eugene Code which defines gross sales and gross receipts. Section 3.710 provides for tax credits to certain owner-occupants of property in the Downtown

Development District. Section 3.715 provides for the administration of the taxes by the Director of the Department of Finance. Section 3.720 provides a means for forcing the collection of the taxes imposed by the proceding sections, and section 3.996 imposes penalties for failure to pay the tax as required and for divulging confidential information as defined in section 3.715.

On August 13, 1973, the Common Council of the City of Eugene levied a tax of approximately $130,000 on the real property in the Downtown Development District. On the same day the Common Council of the City of Eugene adopted the budget for the Downtown Development District by Ordinance 16906.

On the 8th day of October, 1973, the City of Eugene added section 5.232

and 5.233 which regulated the parking in the Downtown Development District, restricting that parking to certain individuals and permitting free parking to others.

On January 7, 1974, the City of Eugene enacted Code section 5.233 which required employers of persons in the Downtown Development area to furnish certain information to them. On the same date Code section 5.990 was enacted which provided for penalties for violation of the parking provisions and for failure to supply information as required by Code section 5.233.

The effect, and intent, of these ordinances and levies was to create a scheme of differential taxation unique in this nation: Unlike special assessment districts (for sewers and the like) where

the persons taxed receive the benefits of the tax, the Eugene Downtown Development District is an arbitrary classification where the persons taxed receive no direct benefits from the tax. Indeed, those within the District are subject to quasi-criminal penalties if they attempt to enjoy the benefits created by the taxes they pay.

The Jarvill and Lichty actions seek a declaratory judgment that the ordinances be declared void and unconstitutional. The complaints alleged that the ordinances were void as violative of Amendment XIV of the United States Constitution and various provisions of the Oregon Constitution. In a companion case, the City of Eugene seeks to recover unpaid Downtown Development District taxes from a retail store located within the

district owned by Great Western Schism, Inc. The trial court held that the ordinances were valid and constitutional and that the City of Eugene was entitled to collect the tax which it had asserted against Great Western Schism, Inc. The Court of Appeals affirmed in part and reversed in part. Dissenting opinions were filed by Butler, J. and Joseph, J. The majority opinion does not discuss the federal constitutional issues. The Equal Protection Clause was briefly discussed in each of the dissenting opinions.

The Supreme Court of Oregon affirmed the decision of the Court of Appeals as modified. Peterson, J. filed a dissenting opinion. The Court's opinion discusses both the issues of privileges and immunities and of equal protection. Both the Court of Appeals and the

Supreme Court of Oregon found that the ordinances were not repugnant to the Constitution of the United States.

Petitioners raised the question of validity of these ordinances under the Fourteenth Amendment of the Constitution of the United States at every stage of this case, including in Petitioner's Petition for Rehearing in the Supreme Court of the State of Oregon:

> "(5) The taxing provisions of the Downtown Development District deny the citizens affected thereby of their rights to equal protection guaranteed them by the Fourteenth Amendment of the United States Constitution and Article I, §20 of the Oregon Constitution.
>
> (6) The Downtown Development District business tax imposed upon professionals within the District is arbitrary and class legislation in violation of the Fourteenth Amendment of the Constitution of the United States and Article I, &20 of the Constitution of the State of Oregon.

> (7) The parking regulations set forth in Section 5.232 of the Eugene Municipal Code deny those citizens affected thereby rights to equal protection guaranteed them by the Fourteenth Amendment of the United States Constitution and Article I, §20 of the Oregon Constitution." Appellant's Petition for Rehearing at 3 and 4

V. Reasons for Allowance of this Writ.

There are special and important reasons for granting Petitioner's Writ of Certiorari. A state court of appeals had decided an important question of federal law which has not been but which should be settled by this Court. The factual situation, as set forth in the Statement of the Case, supra, is unique in American history: A city, by majority vote, has taxed a discreet and insular minority distinguished on the basis of geographical location. The citizens of

the City of Eugene whose businesses and professional offices are within the Downtown Development District are subject to a special tax; citizens of the City of Eugene outside the District are not subject to the special tax. Those within the District receive no direct benefit from the tax; those outside the District receive all the benefits from the tax.

No decision of this Court nor any other reported decision (aside from the Opinions in this case) has dealt with such a situation. It is not surprising that this problem has not occurred before--the very unfairness of such a scheme of differential taxation renders it unlikely to be adopted by any government. For the reasons the scheme is unfair, it also violates the Equal Protection and Due Process Provisions of the Fourteenth

Amendment to the Constitution of the United States.

In West Virginia State Board of Education v. Barnette, 319 US 624, 638, 63 SCt 1178, 185-186, 87 L.Ed. 1628 (1943), this court stated:

> "The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

The court reaffirmed this principle in Lucas v. Forty-Fourth General Assembly of Colorado, 377 US 713, 736-737, 84 SCt 1459, 1474, 12 L.Ed. 2d 632 (1964):

> "...A citizen's constitutional rights can hardly be infringed simply because a majority of people choose that it be."

In sum, a plebiscite by those receiving the benefits of a tax does not cure the constitutional defect in imposing the tax on an unwilling minority.

Substantively, the differential taxation scheme embodied in the ordinances of the City of Eugene violates both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States. Citizens of the City of Eugene within the special district are denied equal protection because geography is an impermissible basis for a classification. At a minimum, the Equal Protection Clause clearly includes the protections found in Article I, Section 32 of the Oregon Constitution with respect to uniform taxation.

> "(2) Location Not a Proper Basis. Before specific permissible bases for classifying property for purposes of taxation are listed, it is appropriate to eliminate one basis which is generally not regarded as

> permissible and which apparently is ruled out explicity and completely by the requirement of territorial uniformity in the Oregon constitution. This basis is location. 'Location of land,' says Cooley [citing 1 Cooley, Taxation 718 (4th ed 1924)], is 'not a proper basis for classification.'" O. Etter, Municipal Tax Differentials, 37 Or L Rev 1, at 41 (1957) (footnotes omitted)

The Due Process Clause is likewise violated because an election within the Downtown Development District has not been held; the City is depriving persons of property if they are located within the arbitrary boundaries of the District.

The fundamental and rankling objection to this system of differential taxation was well-summarized by Judge Joseph in Jarvill v. City of Eugene, 40 Or App 185, at 202 and 203, 594 P2d 1261 (1979) (dissenting opinion):

"Finally, I note that majority virtually ignores the violations of equal protection in a tax scheme that taxes specific persons and denies them all direct benefits of the program financed by the taxes. The taxes that stimulated the American revolution were less objectionable than that."

For the reasons stated, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

_____

Larry R. Roloff
Attorney at Law

Supreme Court, U. S.
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October Term, 1980

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APPENDIX FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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APPENDIX I

Opinions Below

A. Opinion of the Oregon Supreme Court.

No. 53—May 28, 1980

IN THE SUPREME COURT OF THE STATE OF OREGON

In Banc*

JARVILL,
Petitioner,
v.
CITY OF EUGENE, et al,
Respondents.

LICHTY,
Petitioner,
v.
CITY OF EUGENE, et al,
Respondents.

CITY OF EUGENE,
Respondent,
v.
GREAT WESTERN SCHISM, INC.,
Petitioner.

(CA 8516, SC 26299)

On Review from the Court of Appeals.**

Argued and submitted October 1, 1979.

Larry R. Roloff, Eugene, argued the cause and filed briefs for petitioners.

Lester M. Swanson, Jr. Eugene, argued the cause for respondents. With him on the briefs were Orval Etter and Johnson, Harrang & Mercer, Eugene.

James A. Redden, Attorney General, and Ira Jones, Senior Assistant Attorney General, Salem, filed an amicus curiae brief for the Department of Revenue.

HOWELL, J.

Affirmed as modified.

Peterson, J. dissenting.

*Holman, J., retired January 21, 1980.

**Appeal from Circuit Court, Lane County (Nos. 74-2507, 74-2508, 74-3369) F. Gordon Cottrell, Judge 40 Or App 185, 594 P2d 1261 (1979)

HOWELL, J.

These three cases, consolidated for trial and appeal, involve a comprehensive challenge to the validity of a charter amendment and various ordinances enacted by the City of Eugene ("City") to revitalize its downtown core area. Eugene, like many other cities, became concerned that its downtown business area was not economically competitive with outlying shopping areas for various reasons, including the lack of adequate parking facilities.

In July, 1973, the voters approved an amendment to the charter conferring on the city council the power

> "To establish, and from time to time to change the boundaries of, a downtown development district; for purposes of public parking facilities for vehicles in the district, of public transportation in, to, and from the district, and of economic promotion and development for the district, to tax persons, property, and economic enterprise in the district; and to establish one or more agencies to assist the city in the exercise of those powers." Eugene City Charter, ch. VII, § 48(70) (1973).

Pursuant to the charter amendment, the council enacted ordinances which provided free parking within the Downtown Development District ("District"), but which restricted parking by employers and employees of District businesses, by District residents, and by District hotel or motel guests. In order to finance and administer its economic development and its free parking programs, the City enacted ordinances for the levying of certain taxes. An ordinance allowed for an ad valorem real property tax by the City on real property in the District;[1] another ordinance provided for a tax of $2.50 per $1,000 of gross retail sales and receipts from nonprofessional businesses within the District; and a third imposed a tax of $40 on professional businesses within the District for each quarter

[1] The voters approved a measure allowing the City to levy a tax of $129,250 on real property in the district in excess of the six percent limit prescribed by article XI, § 11, of the Oregon Constitution.

of the year per each professional and each employee of a professional.

In 1974 Jarvill and Lichty filed complaints for declaratory judgments in the Circuit Court of Lane County alleging that the City ordinances are unconstitutional. In 1975 the City sued Great Western Schism, owner of a retail store located within the District, to recover unpaid gross sales and receipts taxes levied in the District. Because Great Western Schism raised defenses identical to the complaints of Jarvill and Lichty, the circuit court consolidated the three cases.[2]

In the trial court and in the Court of Appeals the plaintiffs have raised numerous contentions challenging the validity of the charter amendment and the City ordinances relating to the District taxes. Generally, plaintiffs contend that the taxes are unlawful or beyond the City's power. Plaintiffs also contend that the ad valorem property tax and the professional and nonprofessional business taxes violate the separate guarantees of equality found in Article I, sections 20 and 32, of the Oregon Constitution and in the fourteenth amendment to the United States Constitution in two general ways: (1) in that property and businesses within the District are taxed while similar property and businesses in other parts of the city are not subject to similar taxation; and (2) in that not all real property and not all businesses within the District are taxed equally. For these same reasons, and particularly because the taxes apply only to District property, plaintiffs contend that the District taxes violate the Uniformity of Taxation Clause of article I, section 32, of our state constitution. Finally, among a myriad of other less substantial challenges, plaintiffs contend that the restrictions on parking in the District violate

[2] Because all three cases involve the same issues, we shall refer to the three opponents to the measures as plaintiffs.

art I, § 20, of the Oregon Constitution and the fourteenth amendment to the United States Constitution.[3]

The trial court upheld the charter amendment and the taxing ordinances in all respects. The Court of Appeals affirmed the trial court except that the Court of Appeals *sua sponte* held that the tax court and not the circuit court had jurisdiction over plaintiffs' challenges to the validity of the ad valorem property taxes. 40 Or App 185, 594 P2d 1261 (1979).

We will first discuss the issue of whether the circuit court or the tax court had jurisdiction over the challenges to the ad valorem real property tax levied by the City on property within the District.

I. CIRCUIT COURT JURISDICTION

The exclusive jurisdiction of the tax court extends to "all questions of law and fact arising under the tax laws of this state." ORS 305.410(1).[4] Furthermore, the

[3] The Court of Appeals characterized all the plaintiffs' challenges as a "scattershot pattern of contentions." Apparently the Court of Appeals was influenced by the fact that plaintiffs' challenges ranged from contentions that the ordinances violated equal protection and uniformity of taxation to a contention that the ordinances violated the canons of legal ethics.

[4] ORS 305.410 reads as follows:

"(1) Subject only to the provisions of ORS 305.445 relating to judicial review by the Supreme Court and to subsection (2) of this section, the tax court shall be the sole, exclusive and final judicial authority for the hearing and determination of all questions of law and fact arising under the tax laws of this state. For the purposes of this section, and except to the extent that they preclude the imposition of other taxes, the following are not tax laws of this state:

"(a) ORS 577.110 to 577.605 relating to beef council contributions.

"(b) ORS 576.051 to 576.584 relating to commodity commission assessments.

"(c) ORS chapter 477 relating to fire protection assessments.

"(d) ORS chapters 731, 732, 733, 734, 737, 743, 744, 746, 748 and 750 relating to insurance company fees and taxes.

"(e) ORS chapter 473 relating to liquor taxes.

"(f) ORS chapter 583 relating to milk marketing, production or distribution fees.

(Continued on following page)

state legislature has provided that no person may contest in a circuit court any matter within the jurisdiction of the Oregon Tax Court. ORS 305.410(3).

The Court of Appeals reasoned that, because ad valorem property taxation in Oregon is comprehensively governed by state law, the City's property tax was levied under the tax laws of this state, and the challenges to the City's property tax presented questions of state tax law that are within the exclusive jurisdiction of the Oregon Tax Court.[5]

Unfortunately the tax court jurisdiction statute has never been a picture of statutory clarity. Originally,

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"(g) ORS chapter 767 relating to motor carrier taxes.

"(h) ORS chapter 319 relating to motor vehicle and aircraft fuel taxes.

"(i) ORS title 39 relating to motor vehicle and motor vehicle operators' license fees and boat licenses.

"(j) ORS chapter 578 relating to wheat commission assessments.

"(k) ORS chapter 562 relating to racing taxes.

"(l) ORS chapter 657 relating to unemployment insurance taxes.

"(m) ORS chapter 656 relating to workers' compensation contributions, assessments or fees.

"(n) ORS chapter 579 relating to potato commission assessments.

"(o) ORS 311.420, 311.425, 311.455, 311.650, 311.655 and ORS chapter 312 relating to foreclosure of real and personal property tax liens.

"(2) The tax court, the circuit courts and district courts shall have concurrent jurisdiction to try actions or suits to determine the priority of property tax liens in relation to other liens.

"(3) Except as permitted under section 2, amended Article VII, Oregon Constitution, this section and ORS 305.445, no person shall contest, in any action, suit or proceeding in the circuit court or any other court, any matter within the jurisdiction of the tax court."

[5] With respect to questions of law regarding the city's taxes on professional and nonprofessional businesses within the District, the Court of Appeals held that the circuit court had jurisdiction because these taxes were enacted pursuant to the city's charter authority rather than under the tax laws of Oregon.

ORS 305.410 provided that the tax court would be the "sole, exclusive and final authority for the hearing and determination of all questions of law and fact arising under the tax laws of the state *in cases within its jurisdiction.*" Or Laws 1961, ch 533, § 12 (emphasis supplied). In the same legislation that created the Oregon Tax Court and added ORS 305.410, the legislature amended sections of ORS chapters 306, 308, 311 (all concerned with county property taxation regulated by state law), chapter 314 (state income taxation), and chapters 321 and 528 (state forest taxation) to expressly provide for appellate review of determinations and assessments in the fields of property, income, and forest taxation. *See* Or Laws 1961, ch 533, §§ 41 to 56. The original legislation therefore established a tax court with limited jurisdiction over three fields of taxation.

The first tax court jurisdictional problem encountered by this court involved the question whether the tax court had authority to issue a writ of mandamus to require a county assessor to extend a particular levy upon the county tax rolls. In *Woodburn v. Domogalla*, 238 Or 401, 395 P2d 150 (1964), we stated:

> "The jurisdiction of the tax court is nowhere expressly defined. ORS 305.410 * * * is not helpful in defining the court's jurisdiction. It simply provides that in cases within its jurisdiction, *whatever that may be,* the tax court has the exclusive and final authority to adjudicate questions arising under the tax laws of this state." 238 Or at 405 (emphasis in original).

We held that the tax court's original jurisdiction to hear tax questions was limited and that mandamus cases were not "cases within its jurisdiction" under ORS 305.410.

The legislature responded to the *Woodburn* decision by amending the tax court statutes to provide the tax court with general (not limited) jurisdiction and the same powers as a circuit court to exercise all ordinary

and extraordinary legal, equitable and provisional remedies. *See, e.g.,* ORS 305.405, 305.435, 34.120; Or Laws 1965, ch 6, §§ 1, 6, 10. The legislature also amended the language of tax court jurisdiction to include jurisdiction over "proceedings" to set aside an order of the State Tax Commission, not just "appeals" from the State Tax Commission. *See, e.g.,* ORS 305.425, 305.515, 321.470, 321.660, 321.765; Or Laws 1965, ch 6, §§ 3, 8, 13-15.

Presumably to further clarify its expansion of tax court powers,[6] the legislature changed the language of ORS 305.410. The phrase, "in cases within its jurisdiction," was deleted, and the legislature added a list of state levied taxes and assessments that "are not tax laws of this state" and therefore not within the exclusive jurisdiction of the tax court. Thus, ORS 305.410 was amended to substantially its present form. Or Laws 1965, ch 6, § 2. Two concepts remained, however. First, the legislature separately provided for tax court jurisdiction over specific taxes: the county property tax, the state income tax, and the state forest tax.[7] Second, where the legislature did not provide for jurisdiction over a specific tax, it generally provided for tax court jurisdiction over "the tax laws of this state," in ORS 305.410(1).

The City contends that tax laws enacted by a city government are "tax laws of this state," because a city's authority ultimately comes from the state. We do not agree. ORS 305.410(1) says "tax laws *of this state.*" The plain and natural meaning of this phrase is that the tax law must be enacted by the state governmental authority. *Cf. Girt et al v. Tri-Met et al,* 4 OTR 92, 96-98 (1970).

[6] The major changes were for the purpose of clarifying the original jurisdiction and general powers of the tax court. *See* Or Laws 1965, ch 6, § 16.

[7] Later the legislature added ORS 323.416, providing for tax court review of state cigarette taxation, and ORS 305.115, providing for tax court review of Department of Revenue orders. These are two additional examples of tax court jurisdictional provisions codified outside of ORS 305.410.

This conclusion is supported by the legislature's use of the term "tax laws of this state" in ORS 305.410(1) when it listed the several tax laws that "are not tax laws of this state." ORS 305.410(1)(a) to (o). These tax laws are state enacted taxes, assessments, fees and contributions imposed by state statutes, for example, fire protection assessments (ORS ch 477), liquor taxes (ORS ch 473), and motor carrier taxes (ORS ch 767). The exclusion of these specific taxes indicates that the legislature intended, by the phrase "tax laws of this state," to include all other state taxes imposed and administered by the state.[8]

On the other hand, we find no evidence that the legislature intended that tax laws enacted by a city government are "tax laws of this state" subject to the exclusive jurisdiction of the tax court by virtue of ORS 305.410(1). On the contrary, when the legislature did intend to grant the tax court jurisdiction over a tax law enacted by a city government, it did so by *separately* providing for tax court jurisdiction over specific *state-related* aspects of the local taxation. For example, when a state agency enters into an agreement with a political subdivision to collect, administer and distribute local taxes imposed upon or measured by gross or net income or wages and local general sales and use taxes, then the Oregon Tax Court has exclusive jurisdiction to review the state agency's orders relating to its administration of the local taxes. *See* ORS 305.620. Also, when a local tax levy is made contrary to the state local budget law (ORS 294.305 to 294.520) or any other state law relating to tax levies, the local tax shall be voidable in the Oregon Tax Court by following a specific procedure. ORS 294.485. *See*

[8] Later amendments to ORS 305.410 and to the jurisdiction of the tax court support our conclusion. In 1971 the legislature removed gift and inheritance taxes from the list of taxes that "are not tax laws of this state" in ORS 305.410(1). *See* Or Laws 1971, ch 567, § 14. In the same legislation, ORS 118.410 was amended to provide for tax court jurisdiction over the state inheritance tax law and ORS 119.280 was amended to provide for tax court jurisdiction over the state gift tax law. Or Laws 1971, ch 567, §§ 10, 13.

Girt et al v. Tri-Met et al, supra. These statutes are separate jurisdictional provisions for tax court review when a local tax conflicts with state law or is administered by a state agency.[9]

We therefore hold that, by the phrase "tax laws of this state," the legislature intended that the tax court have exclusive jurisdiction to decide questions that arise under tax laws enacted by the state government. Plaintiffs challenge the City charter amendment and City ordinances that impose the City property and business taxes. Because these tax laws were enacted by the City, they are not "tax laws of this state." The questions presented by these challenges were properly litigated in the circuit court.

But the City contends that, because plaintiffs challenge the City property and business taxes as violative of article I, section 32, of the Oregon Constitution, and because that constitutional provision is a tax law of this state, plaintiffs' challenge based on article I, section 32, is a "question * * * arising under the tax laws of this state" which must be litigated in the tax court. Assuming but not deciding that article I, section 32, is a tax law of this state, the City's interpretation of ORS 305.410(1) reveals another problem with that statutory provision which we must now resolve. According to the City, the tax court has jurisdiction whenever a party, who may be challenging a tax levied by a city, raises a challenge based on, or a question relating to, a tax law of this state. If the same party in the same proceeding, however, raises a challenge not related to a tax law of this state, then presumably that challenge would be litigated in the circuit court. This result—

[9] We note that several cases involving local taxation have been litigated in the circuit courts and the Court of Appeals rather than in the tax court. *See, e.g., Budget Rent-A-Car v. Multnomah County*, 287 Or 93, 597 P2d 1232 (1979) (county tax); *Horner's Market v. Tri-County Trans.*, 2 Or App 288, 467 P2d 671, *rev. denied* 256 Or 124, 471 P2d 798 (1970) (metropolitan transportation district tax). *Cf. Girt et al v. Tri-Met et al*, 4 OTR 92 (1970)(interpreting "tax laws of this state" under ORS 305.410 as encompassing taxes imposed by the legislature and not encompassing a tax imposed by a municipal corporation).

split jurisdiction—is patently unreasonable because it would require a city taxpayer challenging a city tax to institute two separate proceedings in two separate courts.[10]

We do not believe that the legislature intended the application of ORS 305.410(1) to result in split jurisdiction or that the tax court have jurisdiction over a challenge to a city tax, which is not a tax law of the state, merely because the challenge includes a question regarding a tax law enacted by the state. In construing the application of ORS 305.410(1), we must seek to avoid absurd or unreasonable results. *Hollinger v. Blair/Dickson,* 270 Or 46, 53-54, 526 P2d 1015 (1974). In order to avoid split jurisdiction, and in order to litigate all of the challenges to a tax in only one court, jurisdiction under ORS 305.410(1) must be determined by whether *the tax being challenged* is itself a tax law of this state. In other words, when the legislature declared that the tax court has jurisdiction over "all questions * * * arising under" the state tax laws, the legislature intended that, under ORS 305.410(1), the tax court have jurisdiction only when the complaint challenges a state tax, that is, a tax imposed by the state government.[11] When the complaint challenges a tax imposed by a city (and not administered through the county property tax system), then no question arises under a state tax law, and the litigation may proceed in the circuit court, unless

[10] The result of split jurisdiction is more pronounced in the following example. According to ORS 305.410(1)(e), the laws in ORS chapter 473 relating to liquor taxes are not tax laws of this state. Therefore, a taxpayer challenging his liquor tax because he is entitled to, but did not receive, a tax credit under ORS 473.030(6) would have to file his proceeding in the circuit court. If the taxpayer also challenges his liquor tax on the basis of another statute that is a tax law of this state, according to the City's reasoning , that challenge could not be litigated in the circuit court but must be filed in the tax court.

[11] As noted above, the legislature has given the tax court jurisdiction over other taxes and tax questions by statutory provisions separate from ORS 305.410(1). In the present case we are interpreting only the effect of ORS 305.410(1).

jurisdiction in the tax court is separately and specifically provided outside of ORS 305.410(1).

In the instant case, plaintiffs challenge taxes imposed by the City pursuant to its home rule authority. All questions presented by their challenge are within the jurisdiction of the circuit court and were properly litigated therein. We therefore hold that the circuit court had jurisdiction over plaintiffs' challenges to the ad valorem property tax[12] and the other City taxes.

II. MUNICIPAL AUTHORITY

Before we discuss plaintiffs' constitutional challenges to the City's property and business taxes, we should answer plaintiffs' contentions that the City was without authority to establish the District and to impose taxes within the District. Plaintiffs argue that no state statute or case exists which will support the City's charter amendment and the City's creation of the District. They also argue that no state statute authorizes a city to select a portion of its citizens for unique and special tax treatment.

We agree with the Court of Appeals and the circuit court that the District was validly established. The Oregon Constitution, in article XI, section 2, provides that "[t]he legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the constitution and criminal laws of the State of Oregon, * * *." Also, article IV, section 1(5), of the Oregon Constitution provides that the initiative and referendum powers are reserved "to the qualified voters of each municipality and district as to all local, special and municipal legislation of every character in or for their municipality or district. * * * " These "home rule" provisions permit

[12] Like the Court of Appeals, we limit our review to the ad valorem property taxes levied by the City for the two years, 1973-74 and 1974-75. We are not concerned with the City's argument that the District ad valorem real property tax was converted in April of 1975 into a tax on the ownership of real property. 40 Or App at 191 n. 2.

the people of a city or town to decide upon the organization of their government and the scope of its powers under its charter, without the need to obtain statutory authorization from the legislature. *See La Grande/Astoria v. PERB,* 281 Or 137, 142, 576 P2d 1204, *aff'd on rehearing* 284 Or 173, 586 P2d 765 (1978). The charter amendment, passed by the voters of the City in 1973, validly conferred authority on the city council the powers to establish the District and to impose taxes in the District. These charter powers are valid unless they contravene state or federal law. *LaGrande/Astoria v. PERB, supra* 281 Or at 142.

The courts below also correctly held that the City had authority to impose taxes within the District. A municipal corporation may assume powers to impose taxes and to select the kinds of taxes most appropriate in order to provide governmental services. *See, e.g., Horner's Market v. Tri-County Trans.,* 256 Or 124, 131, 471 P2d 798 (1970); *Davidson Baking Co. v. Jenkins et al,* 216 Or 51, 55-59, 337 P2d 352 (1959). The power to impose taxes in the District is expressly provided in the following language of the charter amendment: "for the purposes of public parking ***, of public transportation ***, and of economic promotion and development for the district, *to tax persons, property and economic enterprise* in the District; * * *." (Emphasis supplied.) We interpret the charter amendment to provide express, implicit and essential authority for the property tax, the professional business tax, and the nonprofessional gross sales and receipts tax levied by the City. *Robertson v. Portland,* 77 Or 121, 126-28, 149 P 545 (1915).

The plaintiffs also contend that the City acted beyond its authority because the revenues from the District taxes—which the Downtown Development Board budgets for a free parking program and for an advertising program partially administered by the Eugene Downtown Association—are not used for a public purpose and are used to invest public funds in private

enterprise, in violation of article XI, section 9, of the Oregon Constitution.[13]

The City of Eugene established the District to finance and administer "a program of economic promotion and development" within the city's central business district. Eugene Code, §§ 2.380, 2.381 (1971). The City's objective is to revitalize the central business district by promoting business in the area, by increasing downtown property values, by encouraging downtown shopping, and by improving services within the downtown area.[14] We agree with the circuit court that the City has shown that there would be a general benefit to the economy of the City as a result of the economic improvement of the City's central business district. Thus the City's program of free parking and District advertising serves a legitimate public purpose. *See Carruthers v. Port of Astoria,* 249 Or 329, 341, 438 P2d 725 (1968). We also agree with the trial court's finding that the City's arrangements for the free parking and advertising programs do not expose the taxpayers to any of the risks contemplated by article XI, section 9. This finding, plus the finding that the public funds are expended for a public benefit, leads us to conclude that the District tax revenues are not being spent for private enterprise in violation of article XI, section 9, of the Oregon Constitution. *See Carruthers v. Port of Astoria, supra* at 333-40.

III. UNIFORMITY OF TAXATION

We shall now discuss plaintiffs' contentions that the City's ad valorem property tax, professional

[13] Article XI, section 9, provides in part:

"No county, city, town or other municipal corporation by vote of its citizens, or otherwise, shall become a stockholder in any joint company, corporation or association, whatever, or raise money for, or loan its credit to, or in aid of, any such company, corporation or association. * * * ."

[14] For a discussion of other city programs and other methods for revitalizing central business districts, *see* Weaver & Duerksen, *Central Business District Planning and the Control of Outlying Shopping Centers,* 14 Urban L Ann 57 (1977).

business tax and gross sales and receipts tax on non-professionals violate the Uniformity of Taxation Clause of the Oregon Constitution (art I, § 32), the Privileges and Immunities Clause of the Oregon Constitution (art I, § 20), and the Equal Protection Clause of the United States Constitution (amend XIV).

Article I, section 32, of the Oregon Constitution is the constitutional provision that most specifically addresses the issue of uniform taxation. That section provides:

> "* * *[A]ll taxation shall be uniform on the same class of subjects within the territorial limits of the authority levying the tax."

Plaintiffs argue that this constitutional provision requires that a city tax be uniform throughout the boundaries of the city levying the tax and that a city is prohibited from imposing a tax on an area within its boundaries smaller than the whole of its city limits.[15] Plaintiffs thus argue that the taxes levied exclusively within the District, which is only a portion of the city, violate the requirement of territorial uniformity found in article I, section 32.

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[15] Plaintiffs contend that territorial uniformity is also required by Article IX, section 1, of the Oregon Constitution, which provides:

> "The Legislative Assembly shall, and the people through the initiative may, provide by law uniform rules of assessment and taxation. All taxes shall be levied and collected under general laws operating uniformly throughout the State."

Plaintiffs do not distinguish between article IX, section 1, and article I, section 32. We have held that these two constitutional provisions requiring tax uniformity are to be read together. *State ex rel v. Malheur County Court,* 185 Or 392, 411, 203 P2d 305 (1949).

The two provisions, however, are not identical. Although article IX, section 1 requires uniform taxation, the specific requirement of *territorial* uniformity is expressed in article I, section 32. If the City taxes do not violate the territorial requirement of article I, section 32, then the taxes do not violate article IX, section 1, in that respect.

Furthermore, article I, section 32, applies to all taxation, state and local, while article IX, section 1 appears to apply only to those taxes that operate throughout the state. Taxes levied by a city, such as those in the instant case, do not operate throughout the state.

The Court of Appeals held that article I, section 32, which permits a municipality to classify for tax purposes, merely requires uniform tax treatment *within each class* throughout the territory, and that all the businesses subject to the District taxes are members of a constitutionally valid class.

Plaintiffs contend, however, that the properties and businesses in the District cannot be considered a separate class from all other properties and businesses in the City because the only common characteristic shared by the properties and businesses in the District is their location.

The instant case therefore presents us with the question whether article I, section 32, prohibits a governmental authority from *territorially* defining a class of subjects for the purpose of separate tax treatment. And, if a territorial classification is not absolutely prohibited, under what criteria is a territorial classification constitutionally valid?

Resolution of these problems requires us to review the history of article I, section 32, as originally drafted, interpreted and applied. Then we will examine the intentions of the drafters of the 1917 amendment that changed article I, section 32 to its present form.

Territorial Uniformity Prior to 1917.

Originally, in the Oregon Constitution of 1859, article I, section 32, provided: "* * * [A]ll taxation shall be equal and uniform." In addition, article IX, section 1, originally provided:

> "The Legislative Assembly shall provide by law for uniform and equal rate of assessment and taxation; * * *."

The simple language of these provisions was intended to prevent anyone from escaping his just share of the tax burden, and these requirements of "equal and uniform" taxation can be traced to a public distrust of state legislatures who were likely and willing to aid railroads and other private economic enterprises by

levying state and local taxes to assist private construction and by granting privileges and tax exemptions to vested interests. *See* Report of Board of State Tax Commissioners 15-16 (1911). *Cf. Township of Pine Grove v. Talcott,* 86 US (19 Wall) 666, 22 L Ed 227 (1873). The constitutional requirements of equal and uniform taxation, in Oregon as in other states, resulted in the general property tax—the taxation of everything, tangible and intangible, by one uniform rule. *See* Judson on Taxation 562 (1903). *See generally Standard Lumber Co. v. Pierce et al,* 112 Or 314, 333-334, 228 P 812 (1924).

Territorial uniformity was a judicial concept that appears to have developed from a strict interpretation of the requirements of uniformity and equality in taxation. Simply stated, the territorial uniformity concept required that a tax operate uniformly throughout the territorial limits of the government authority within and for which the tax was raised. In other words, it required that a tax levied by the state (for a state purpose) be uniform throughout the state, a tax levied by a county (for a county purpose) be uniform throughout the county, and so on. *See, e.g., Yamhill County v. Foster,* 53 Or 124, 99 P 286 (1909); *Cook v. The Port of Portland,* 20 Or 580, 27 P 263 (1891); *City of East Portland v. County of Multnomah,* 6 Or 62 (1876); *Board of Comm'rs of Jackson County v. State ex rel Shields,* 155 Ind 604, 58 NE 1037 (1900); *Watkins v. Barrow,* 121 Va 236, 92 SE 908 (1917); *Day v. Roberts,* 101 Va 249, 43 SE 362 (1903); *The People v. Salem,* 20 Mich Rep 452, 474, 4 Am Rep 400 (1870); *Knowlton v. Supervisors of Rock County,* 9 Wis Rep 410 (1859); *Exchange Bank of Columbus v. Hines,* 3 Ohio St Rep 1 (1853); Gray, Limitations of Taxing Power and Indebtedness 670, § 1351b (1906); Cooley, Constitutional Limitations 711, 726 (7th ed Lane 1903). *See also Township of Pine Grove v. Talcott, supra; Gilman v. City of Sheboygan,* 67 US (2 Black) 510, 17 L Ed 305 (1862). The concept was so widely accepted that, as one legal scholar observed, "[i]n some of the constitutions

this rule is expressly stated, but where it is not thus expressly stated the constitutions are interpreted in conformity with it." Gray, *supra* at 670.[16]

[16] The requirement that taxation be uniform throughout the tax district, as expressed prior to 1917, was summarized in the following analysis of one legal scholar of that era:

> "* * * A requirement of uniformity does not mean that the rate of taxation shall be exactly the same in every subdivision of the state. The legislature may create taxing districts for special purposes and may levy taxes in those districts for purposes germane to the objects for which the districts are created.
>
> "The rule only requires that taxation shall be uniform within the limits of the authority levying the tax, that is, that a tax levied for state purposes shall be uniform throughout the state, a tax levied for county purposes shall be uniform throughout the county, and so on. In some of the constitutions this rule is expressly stated, but where it is not thus expressly stated the constitutions are interpreted in conformity with it.
>
> "There is uniformity and equality of assessment and taxation where the same basis of assessment is fixed for all property, and the same rate of taxation is fixed within the district subject to taxation. If it be a tax for state purposes, there is equality and uniformity where the rate is the same throughout the state; if for county or township purposes there is equality and uniformity where the rate is the same throughout the county or township. So long as this result is reached, it makes little or no difference by how many or by what agencies it is accomplished." Gray, *Limitations of Taxing Power and Indebtedness* § 1351b at 670 (1906). (Footnotes omitted.)

See also, Cooley, Constitutional Limitations 726 (7th ed Lane 1903):

> " * * * The rule of apportionment must be uniform throughout the taxing district, applicable to all alike; but the legislature have no power to arrange the taxing districts arbitrarily, and without reference to the great fundamental principle of taxation, that the burden must be borne by those upon whom it justly rests. * * *"

It is interesting to note, however, that decisions of this court prior to 1917, that recognized and applied the rule of territorial uniformity of taxation, nevertheless permitted some territorially defined differentials in taxation. *See, e.g., Johnson v. Jackson County,* 68 Or 432, 136 P 874 (1914); *City of East Portland v. County of Multnomah,* 6 Or 62 (1876). Other state courts also permitted some exception to the requirement of territorial uniformity. *See e.g, Watkins v. Barrow,* 121 Va 236, 92 SE 908 (1917); *Daly v. Morgan,* 69 Md 460, 16 A 287 (1888).

In one comprehensive study of constitutional provisions requiring uniformity of taxation, the author dismissed the importance of a territorial uniformity requirement in the following words:

> "* * * A geographical connotation is a part of the complete idea symbolized in the term, and quite often the expression 'within the

(Continued on following page)

Territorial Uniformity after 1917

The requirement of territorial uniformity was altered when the Oregon Constitution was amended in 1917 to provide for classification in taxation. Dissatisfaction with the "uniform and equal" provisions of the Oregon Constitution had previously led to the appointment in 1905 of a commission for the purposes of examining and reporting upon matters of state assessment and taxation of property. The following portions of the commission's report are enlightening:

> "The constitutional provisions of this State have been found in the past to be unnecessarily rigid. Apparently by tacit consent they have been waived in certain instances. For instance, for many years exemptions have been allowed, not permitted by the constitution, of one class of property or another, * * *.
>
> "Of recent years there has been a growing tendency in this State, in common with many other States of the Union, to divorce one class of property from another for the purpose of raising revenue for state purposes as distinguished from local. * * *
>
> "However, this principle has been extended almost as far as now seems possible, inasmuch as under our present constitutional provisions such taxes, ordinarily designated as specific taxes, must be entirely supplemental to the general property tax contemplated by the constitution. Unless our constitutional provisions be made more elastic it is difficult to see how this principle can be further extended. * * * Your Commission has drafted the following amendments to the constitutional provisions quoted, which it believes are sufficiently elastic *to permit the selection of the classes of taxable property* by the legislature, the assignment of one class of property for either the

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territorial limits of the taxing authority' occurs in the constitutions; but geographical uniformity is not a primary basis for limiting the taxing power, either of the states or the federal government. Its purpose is to create what may be thought of as an administrative rule for the uniform execution of such tax legislation as the legislature may enact, and logically falls outside the expressed concern of this discussion." Matthews, *The Function of Constitutional Provisions Requiring Uniformity in Taxation,* 38 Ky L J 31, 56 (1949).

> application of the property tax or the specific tax beyond the privilege tax, and *yet will maintain the present requirements of uniformity and equality within each class itself.* * * *" Report of Tax Commission 8-9 (1906). (Emphasis supplied.)

The Commission then recommended that article I, section 32, be amended to read:

> "' * * * [A]ll taxation shall be equal and uniform *upon the same class of subjects within the territorial limits of the authority levying the taxes.'" Id.* (Emphasis in original.)

And the Commission recommended that article IX, section 1, be amended to read:

> "'* * * The legislative assembly shall provide by law for uniform and equal rate of assessment and taxation *upon the several classes of subjects of taxation within the territorial limits of the authority levying the taxes;* * * *.'" *Id.* (Emphasis in original.)

These recommendations appear to have been the first proposals in Oregon for amending article I, section 32, by using the phrase "upon the same class of subjects within the territorial limits of the authority levying the tax." Although different language was used in the amendments submitted to the Oregon voters in 1910,[17] in 1912,[18] and in 1914,[19] the purpose of the amendments never changed. They were intended to permit the reasonable classification of subjects of

[17] The amendment to article I, section 32, submitted in 1910 would have omitted the words "and all taxation shall be equal and uniform" and inserted the words "taxes shall be levied and collected for public purposes only, and the power of taxation shall never be surrendered, suspended, or contracted away." *See* Voters' Pamphlet, General Election, November 8, 1910, p. 24.

[18] The amendment to article 1, section 32, submitted in 1912 would have provided uniform taxation upon each separate class with the territorial limits of the authority levying the tax and would have permitted taxes to be levied upon different classes of property at different rates. *See* Voters' Pamphlet, General Election November 5, 1912, p. 21.

[19] The amendment to article I, section 32, submitted in 1914 was identical to that proposed in 1910. At the same time an amendment to article IX, section 1, was submitted that provided for "reasonable classifications of the subjects of taxation." *See* Voters' Pamphlet, General Election, November 3, 1914, pp. 12-13.

taxation, the exemption of certain property from taxation, and the imposition of different rates of taxation upon different classes of property. *See, e.g., Standard Lumber Co. v. Pierce et al, supra,* 112 Or at 335; Reed, *For Equal Distribution of Tax Burden,* Oregon Voter 10-13 (May 19, 1917); Voters' Pamphlet, Special Election, June 4, 1917, pp 14-15; Message of Oswald West, Governor of Oregon, p 41 (1915); Voters' Pamphlet, General Election, November 5, 1912, pp 22-30; Message of Oswald West, Governor of Oregon, pp 4-5 (1911); Report of Board of Tax Commissioners 19-21, 27 (1911); Voters' Pamphlet, General Election, November 8, 1910, pp 24-25; Report of Tax Commission 5-10 (1906).

Although the primary purpose of the 1917 amendments was to permit classification, the use of the phrase "within the territorial limits of the authority levying the tax" raised the principle of territorial uniformity to that of an express constitutional requirement. But the drafters intended a requirement of territorial uniformity within each class of subjects taxed. Thus *Standard Lumber Co. v. Pierce et al, supra,* in discussing the 1917 amendments to article I, section 32, and article IX, section 1, stated that "*among the members or objects included in a class* selected by the legislature, inherent uniformity as well as *territorial uniformity is required.*" 112 Or at 335-36. (Emphasis supplied.) Indeed, the intentions of the drafters of the amendments can be traced back to the 1905 commission which, as quoted above, sought to draft constitutional provisions

> " * * * sufficiently elastic to permit the selection of the classes of taxable property * * *, and yet * * * maintain the present requirements of uniformity and equality *within each class itself.*" Report of Tax Commission 9 (1906) (emphasis supplied).

Thus, once a taxing authority selects a class for taxation, the tax must apply uniformly among all objects

in the class that are within the territorial limits of the authority levying the tax.[20]

Territorial Classification

Plaintiffs contend that article I, section 32, prohibits a taxing authority from classifying the subjects of taxation according to a geographical location. They further contend that the only common characteristic shared among those taxed in the District is their location.

Past decisions of this court have recognized the role of the judiciary in reviewing the constitutionality of tax classifications, but we have also recognized and expressly held that a taxing authority has a wide range of discretion to classify subjects of taxation. *See, e.g., Huckaba v. Johnson,* 281 Or 23, 25-26, 573 P2d 305 (1978); *Tharalson v. State Dept. of Rev.,* 281 Or 9, 16, 573 P2d 298 (1978); *Dutton Lbr. Corp. v. Tax Com.,* 228 Or 525, 539, 365 P2d 867 (1961); *Smith et al v.*

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[20] Plaintiffs argue that in *State ex rel v. Malheur County Court,* 185 Or 392, 411, 203 P2d 305 (1949), we held that article I, section 32, and article IX, section 1, require that taxation shall be uniform within the territorial limits of the authority levying the tax and that the rate of taxation must be equal and uniform "throughout the taxing district, whether state or local" (*quoting* from *Yamhill County v. Foster,* 53 Or 124, 129, 99 P 286 (1909). Plaintiffs' reliance on *Malheur County,* however, is misplaced. That case involved challenges to a state statute requiring counties to levy a tax to pay their share of state public welfare according to the need for relief funds in each county. We reasoned that "* * * if a tax is equal and uniform throughout the taxing district, there is no violation of the constitutional mandate [of uniform taxation]." *Id.* at 411. We then concluded that:

> "In our opinion, chapter 545 [the state statute in question] imposes a duty upon each county to levy a county tax. * * * Since the tax required to be levied is a county tax, and since the levy will be uniform within each county, there is a sufficient compliance with the provisions of the constitution requiring uniformity." *Id.* at 412.

Thus, we did not hold that *all* taxation *must* be uniform throughout the taxing district; we merely held that a tax that is uniform throughout the taxing district is constitutional. Our statements in *Malheur County,* that a tax must be uniform within the territorial limits of the authority levying the tax and that the rate of taxation must be uniform throughout the taxing district, were only *dicta.* We note in particular that *Yamhill County, supra,* was decided prior to the 1917 amendments to article I, section 32, and article IX, section 1.

Columbia County et al, 216 Or 662, 341 P2d 540 (1959); *Wittenberg et al v. Mutton et al,* 203 Or 438, 280 P2d 359 (1955); *Garbade and Boynton v. City of Portland,* 188 Or 158, 191-92, 214 P2d 1000 (1950).

In previous decisions we have upheld the legislature's classification of income for taxation (*McPherson v. Fisher,* 143 Or 615, 622, 23 P2d 913 (1933)); the legislature's classification of occupations for taxation (*State v. Winegar,* 157 Or 220, 225, 69 P2d 1057 (1937)); a municipal corporation's classifications of various kinds of businesses, trades and professions for a license tax (*Garbade and Boynton v. City of Portland, supra* at 192); the legislature's separate tax treatment of nonresidents for income tax (*Berry v. Tax Commission,* 241 Or 580, 397 P2d 780, 399 P2d 164 (1964)); and the legislature's classification for inheritance tax purposes of property on the basis of its location either inside or outside the state (*Tharalson v. State Dept. of Rev., supra* at 15-17). *See generally* Etter, *Municipal Tax Differentials,* 37 Or L Rev 1 (1957).

As noted above, in the present case the city is levying its business and property taxes on all businesses and property within a geographical area. Therefore, the City is not singling out any fixed group of *persons;* anyone might change or move his business or his property investments in and out of the District. *Cf. Tharalson v. State Dept. of Rev., supra* at 17. The persons subject to the City taxes are subject thereto because they own property or operate a business within the District. Therefore, the tax classification would be constitutional as long as the *geographical* area defined as the District is a valid class.

In his article on municipal tax differentials, Etter notes that location is not a proper basis for classifying property. Etter, *supra* at 41. But he goes on to explain:

> "This does not mean * * * that classification which is based on valid factors but which happens to apply to property of a given locality only is thereby rendered invalid. * * *" 37 Or L Rev at 41.

We agree. Recognizing the broad freedom a taxing authority has to classify subjects for taxation, we conclude that a classification based on or defined by geographical location is nevertheless constitutionally permissible if it is also based upon qualitative differences that distinguish the geographical area from other areas within the territorial limits of the authority levying the tax. In other words, a taxing authority may not single out a subterritory for exclusive tax treatment (either taxation or exemption) if that subterritory is indistinguishable from the rest of the territory. But if the subterritory is different in quality compared to the rest of the territory, then article I, section 32, does not prohibit a taxing authority from defining the subterritory as a separate class. This requirement is based upon the principle established in our previous decisions that a tax classification is constitutionally valid if it rests upon genuine differences. *See Huckaba v. Johnson, supra* at 25-26 (citing cases). In addition, if the taxing authority selects a subterritory for taxation and that subterritory is the only area so taxed, then the subterritory must not only be qualitatively different but must also be unique.

There may be two types of qualitative differences that might justify singling out a geographical area for tax treatment. One type might be described as natural qualities. These would be qualities that exist in the land by reason of nature, for example, swamp land, or land with less than 20 inches rainfall, or a flood plain. The second type might be described as politically imposed qualities. These would be qualities that exist in the subterritory by political decision, commitment and action, and they may well result because of economic factors or human conditions. Thus the wider significance of the present analysis is that article I, section 32, does not prevent tax classifications from reflecting qualitative differences that result from land use planning decisions. Such planning decisions are almost inevitably stated in territorial terms; but this does not mean that a tax classification which reflects a land use

classification is based only on location and therefore invalid, rather than being validly based on the qualitative difference in land use characteristics.

The Court of Appeals reasoned that the businesses within the District are a distinct and valid class because they all share the same conditions unique to a downtown urban core area. As the court explained,

> "* * * the persons subject to the District taxes share more than a common geographical boundary. They are also likely to share common conditions of transportation, difficulty of access, scarcity of parking, density, degeneration of physical plant, loss of consumer patronage, esthetic depreciation, concentration of polluting agents, declining value and other conditions of modern life which characterize the downtown core area of many cities in Oregon and elsewhere. It is the economic and physical factors of contemporary urban life, not a boundary, which provide the rational basis for the taxes at issue. * * *" 40 Or App at 196.

Although this analysis alone might adequately validate the territorial classification, we find an additional compelling reason why the District is uniquely and qualitatively different from the remainder of the city.

In addition to the fact that the businesses and property within the District presently share, and in the past have shared, the conditions unique to being in a downtown urban area, the City is taxing the District for the purpose of creating a unique area in the future. The City has committed itself to provide a package of special services not provided elsewhere in the city, including free motor vehicle parking, an economic promotion and development program, and a public transportation program. In this regard, the qualities that distinguish the District from the rest of the City are politically imposed. The District is unique not only because it contains the only downtown area in the city, but also because the City has committed itself to providing services and programs that patently and physically distinguish the District from any other area of the city.

We therefore hold that the City validly classified the District, and the property and businesses therein, for the purpose of separate tax treatment. This classification does not violate article I, section 32, of the Oregon Constitution. For the same reasons, this classification does not grant any citizen or class of citizens a privilege or immunity that is not equally available to all on the same terms (Or Const art I, § 20), nor does it deny anyone the equal protection of the laws guaranteed by the fourteenth amendment to the United States Constitution.

Equality and Uniformity Within the District

Plaintiffs also contend that the property and business taxes are not being levied uniformly and equally *within* the District itself. In addition to arguing that the taxes violate article I, section 32, in this regard, plaintiffs argue that the taxes violate the Privileges and Immunities Clause of the Oregon Constitution (art I, § 20)[21] and the Equal Protection Clause of the fourteenth amendment to the United States Constitution.[22]

Plaintiffs argue that the property tax is discriminatorily imposed within the District because certain properties receive tax credits while similar properties do not. They argue that the business taxes are also discriminatorily imposed because professional businesses are taxed at a flat rate, while nonprofessional businesses are taxed on their gross receipts and sales.

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[21] Article I, section 20, provides:

"No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

[22] The fourteenth amendment to the United States Constitution provides:

"No State shall * * * deny to any person within its jurisdiction the equal protection of the laws."

As noted above, this court recognizes the broad freedom of a taxing authority to classify subjects for taxation. This power to classify includes the authority to subclassify persons included in the general class. *See Huckaba v. Johnson, supra* at 26 (citing cases).

Properties within the District have been subclassified according to whether the property is within the Tenth and Oak Overpark Assessment District (which is located within the Downtown Development District), or according to whether the property is devoted partly or entirely to automobile parking facilities open to the general public on a first-come-first-served basis, free of charge and under control of the Downtown Development District. Properties that provide District-controlled free parking receive a credit that reduces their District property taxes in an amount that reflects the proportion of the property devoted to such public parking. The sum of all the deductions for these properties is then apportioned to all other properties in the District in accordance with their respective assessed valuations. Next, the properties that contributed to the Overpark Assessment District receive a credit equal to their assessment, and that amount is deducted from their District property taxes. The sum of all the deductions for the Overpark assessment is apportioned finally to *all* the properties in the District in accordance with their respective assessed valuations, except the properties whose adjusted property tax does not exceed their Overpark assessment.

Plaintiffs contend that the classification for tax credit of properties located within the Overpark Assessment District is an unconstitutional territorial classification. These property owners, however, do not receive credits because they are located in the Overpark Assessment District. They receive credits because they are assessed by the Overpark Assessment District and thus, like the property owners who provide District-controlled parking, they are already financing public parking within the District. We

therefore conclude that the classification of properties within the Overpark Assessment District is valid and that the property tax is uniform as applied to the classes of property within the District.

Finally, plaintiffs contend that taxing professional businesses in the District at a flat rate while taxing nonprofessional businesses in the District according to their gross sales and receipts violates the constitutional requirements of equal protection and uniform taxation. We disagree. Article I, section 32, does not demand that a taxing authority treat professional businesses and nonprofessional businesses as the same class of subjects. We therefore conclude that the business taxes do not violate article I, section 32.

For the same reasons, the City's tax scheme does not grant any citizen or class of citizens a privilege or immunity that is not equally available to all on the same terms (Or Const, art I, § 20), nor does it deny anyone the equal protection of the laws guaranteed by the Fourteenth Amendment.

IV. DISTRICT PARKING RESTRICTIONS

Plaintiffs contend that the city ordinances that restrict parking by those persons employed, resident or lodged within the District while in their place of employment or while in their lodging or residence constitute a denial of equal privileges or immunities under article I, section 20, of the Oregon Constitution or a denial of equal protection under the fourteenth amendment to the United States Constitution. Both constitutional provisions prohibit class discrimination. *See, e.g., School Dist. No. 12 v. Wasco County*, 270 Or 622, 627-28, 529 P2d 386 (1974); *Plummer v. Donald M. Drake Co.*, 212 Or 430, 437, 320 P2d 245 (1958).

Plaintiffs contend that article I, section 20, is violated because District employers, employees, residents and hotel and motel guests are prohibited from enjoying the free parking privileges available to all other members of the public. Article I, section 20,

however, prohibits only the grant of a privilege which does not belong to all citizens *"upon the same terms."* In the instant case, those persons in the District subject to the parking restrictions nevertheless may enjoy the privilege of free parking upon the same terms as all members of the general public: when they are not working or residing in the District. And no member of the public may park for free while he is employed, resident or lodged in the District. We note that the trial court found that these parking restrictions are intended to prohibit those who would regularly be downtown anyway and who would use downtown facilities for longer periods of time from occupying free parking spaces to the exclusion of consumers and clients, thereby defeating the purpose of the free parking program.

We therefore conclude that the terms of the parking ordinance do not violate article I, section 20, of the Oregon Constitution and, for the same reasons, do not violate the fourteenth amendment to the United States Constitution.

CONCLUSION

Plaintiffs raise many other challenges to the City's ordinances; for example, that the ordinances prohibiting parking are void for vagueness, and that the parking program violates the Motor Vehicle Parking Facilities Act (ORS 223.805 to 223.845). Plaintiffs' other challenges are, however, insubstantial and do not merit discussion.

We conclude that the circuit court had jurisdiction over the challenges to the ad valorem property tax. We also conclude that the City's charter amendment and ordinances are lawful and constitutional.

Affirmed as modified.

PETERSON, J., dissenting.

The majority reaches a result which many would agree is socially, politically and economically desirable. But the decision in this case turns not on social desirability, political wisdom or economic need. This case is determined by Article I, section 32, of the Oregon Constitution. I cannot agree with the conclusion of the majority and therefore dissent. My reasons are:

1. Article I, section 32, by its clear terms, prohibits a taxing authority from creating a class of subjects determined by geographical lines.

2. A policy underlying the "territorial limits" clause of Article I, section 32, is to prevent a majority from imposing tax burdens that should be uniformly distributed upon all, upon a minority within the territorial limits of the taxing authority. The imposition of a tax burden only upon those owning property or operating businesses within a geographical area, when similar property exists outside the geographical area but within the taxing district, is improper and violates the uniformity clause.

1.

Article I, section 32, by its terms, prohibits a taxing authority from creating a class of subjects determined by geographical lines

Article I, section 32, provides:

> "* * * [A]ll taxation shall be uniform on the same class of subjects within the territorial limits of the authority levying the tax."

The phrase "all taxation shall be uniform on the same class of subjects" was contained in a 1917 amendment to Article I, section 32, which previously required that "all taxation shall be equal and uniform." Prior to 1917, the constitution was construed to require that the rate of taxation "be absolutely equal

upon all property of whatever kind * * * [and] property was required to be valued and taxed at equal rates."[1]

The inclusion in 1917 of the words "all taxation shall be uniform on the same class of subjects" permitted "the classification of property in respect to its nature, condition or class, and the imposition thereon of different rates of taxation upon different classes of property."[2] The framers of the 1917 amendment thus guaranteed that (a) among members of a class, uniformity would exist, and (b) that within the taxing district, territorial uniformity would also exist.

In this case, the "authority levying the tax" is the City of Eugene, not the Downtown Development District. For the purposes of this case, the constitutional provision should be read as follows:

> "* * * [A]ll taxation shall be uniform on the same class of subjects within the territorial limits of the [City of Eugene]."

Applying the plain language of the constitution, this requires that all property of the same class within the city be taxed uniformly. There is no claim in this case that properties of the type found in the district are not found elsewhere in Eugene.

The majority upholds the creation of a class determined by geographical location because

> "* * * a classification based on or defined by geographical location is nevertheless constitutionally permissible if it is also based upon qualitative differences that distinguish the geographical area from other areas within the territorial limits of the authority levying the tax. * * * [I]f the subterritory is different in quality compared to the rest of the territory, then article I, section 32, does not prohibit a

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[1] *Standard Lbr. Co. v. Pierce,* 112 Or 314, 334, 228 P 812 (1924).

[2] *Id.* at 335. For an extensive analysis of the uniformity clauses of the various state constitutions, see W. Newhouse, Constitutional Uniformity and Equality in State Taxation (1959).

> taxing authority from defining the subterritory as a separate class. * * *" ___ Or at ___ (Slip opinion at 22).

The majority concludes that a tax classification based upon geographical location is valid if the territory is "qualitatively different," either because of (1) natural characteristics such as "swamp land, land with less than 20 inches rainfall, or a flood plain," or (2) politically imposed qualitative factors such as those resulting from human conditions or the economy of the area. The majority states:

> "* * * [W]e find an additional compelling reason why the District is uniquely and qualitatively different from the remainder of the city.
>
> "In addition to the fact that the businesses and property within the District presently share, and in the past have shared, the conditions unique to being in a downtown urban area, the City is taxing the District for the purpose of creating a unique area in the future. The City has committed itself to provide special services not provided elsewhere in the city: free motor vehicle parking, an economic promotion and development program, and a public transportation program. In this regard, the qualities that distinguish the District from the rest of the City are politically imposed. The District is not only unique because it contains the only downtown area in the city, but is also unique because the City has committed itself to providing services and programs that patently and physically distinguish the District from any other area of the city." ___ Or at ___. (Slip opinion at 24-25).

The majority's conclusions do not withstand critical analysis. The "natural characteristics" approach, under which a class of subjects may be determined by the "qualities that exist in the land by reason of nature," may well be a valid approach, if the law defines the class by the natural characteristics and not by location. But that approach was not used by the City of Eugene to define the class and the subdistricting cannot be upheld on that basis.

The City's creation of the District as a separate class must, if at all, be validated under the majority's second theory, based upon a qualitative difference as (a) an area in which "the businesses and property within the District presently share, and in the past have shared the conditions unique to being in a downtown urban area" or (b) as an area upon which the city is imposing additional taxes "for the purpose of creating a unique area *in the future.*" (Emphasis added.)

As to (b), clearly this is a bootstrap approach under which any taxing body could impose additional taxes upon any area because of planned improvement in order to create "a unique area in the future." Under this concept, a slum area consisting of modest homes, owned by their occupants, could be slated for urban renewal "in order to create a unique area in the future." Taxes to renew the area could be imposed solely upon the homeowners. The property owners' inability to pay the increased taxes might well compel them to sell their homes to investors who could afford to pay the higher taxes in anticipation of increased land values after the qualitative improvements had been made. Such a tax, under the majority's reasoning, would be valid. It would also, in a real sense, be confiscatory.

The city's classification of the District, if valid at all, can only be valid because the property within the District shares unique qualities—qualities which are unique to it, and to it only. But there is no evidence in this case that properties of similar type, similar construction and similar use do not exist outside the geographical area.

The only truly *unique* feature of the District is its location.[3] In no other way can it be said that the conditions in the District are totally unique to it.

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[3] Webster's New International Dictionary of the English Language (2d ed 1961), defines "unique" as "1. Single, sole. 2. Being without a like or equal; single in kind or excellence; unequaled; hence, loosely, unusual; notable."

As to the possibility of regarding the Downtown Development District area as a separate class of property and hence separately taxable under the classification power of Article I, section 32, of the Oregon Constitution, there are obvious difficulties. The only common characteristic the Downtown Development District *must* inevitably share is its location. There are many classifications of property within the area that are common to property immediately outside of the area. Property inside the area is composed of real property, personal property, rental property, inventories, parking lots, perhaps some unimproved property and partially developed property. Whatever its nature, it is clear that similar property exists within the remainder of the city limits of Eugene. Therefore, it cannot be said that any uniform classification was being made within the city on the basis of the property's use or development. Although as stated in *Standard Lbr. Co. v. Pierce,* 112 Or 314, 335-336, 228 P 812 (1924), the classification of property for property tax purposes along functional lines is constitutional under Article I, section 32, such a classification has not in fact been made under the charter and ordinances of the City of Eugene.

Orval Etter, one of the attorneys for the City of Eugene in this case, is well known as an authority on Oregon municipal law. The lead article in the 1957 Oregon Law Review was written by Mr. Etter on the subject "Municipal Tax Differentials."[4] On the subject of classifying property for tax purposes on a geographical basis, Mr. Etter's conclusion leaves no room for doubt—classification based on location is impermissible.

> "(2) Location Not a Proper Basis. Before specific permissible bases for classifying property for purposes of taxation are listed, it is appropriate to eliminate one basis which is generally not regarded as

[4] Etter, *Municipal Tax Differentials,* 37 Or L Rev 1 (1957).

permissible and which apparently is ruled out explicitly and completely by the requirement of territorial uniformity in the Oregon constitution. This basis is location. 'Location of land,' says Cooley [citing 1 Cooley, Taxation 718 (4th ed 1924)], is 'not a proper basis for classification.'" 37 Or L Rev at 41. (Footnotes omitted.)

Mr. Etter hastens to add that, by creating a special taxing district, with authority to levy taxes, taxes can be validly imposed within a subdistrict. He writes:

"Closely related to benefits as a basis for tax classification is the special taxing district in which property in an area is specially taxed to defray the cost of one or more public services specially benefiting that property. Such special taxing districts have been set up innumerable times without violating constitutional requirements that taxes be equal and uniform. Sometimes the rationale for their creation has been that the charges levied in the district have been special assessments and not taxes. Yet the charges have sometimes been called taxes, and the differentiation between the two is not always clear, or at least is sometimes not made explicit. Whatever the proper differentiation between the two, so long as these taxing districts are set up on a reasonable basis, with boundaries that are not wholly arbitrary, they afford a constitutional approach to the problem of classifying property for purposes of public charges. The classification can be based on the benefits received from expenditure of the revenue derived from the charges. Sometimes, indeed, the courts seem to speak interchangeably of classifying property and of including it in a special taxing district.

"The very purpose of these districts 'is to make taxes for certain purposes equal and uniform.' To tax all persons in an area [quoting from 1 Cooley, *supra* at 671, 672, 674]

"'for improvements of a local character may produce the very inequality which is forbidden by state constitutions; and hence the creation of taxing districts for such improvements, so as to place the burden on those specially benefited, creates equality and uniformity rather than destroys it.

> "'* * * different taxing districts, for the same general purpose, may be thus created where there are peculiar reasons why one part of the public should bear a proportion of the burden greater than that which should be borne by another, and a greater rate of taxation be imposed on some districts than others.'
>
> "These districts 'may be as numerous as the purposes for which taxes are levied.'" 37 Or L Rev at 44-45. (Footnotes omitted.)[5]

Another way of achieving the goal sought would be to amend the constitution to permit a city to tax some districts differently than others. *Oak Park Federal Savings & Loan Association v. Village of Oak Park,* 54 Ill 2d 200, 296 NE2d 344 (1973), illustrates this point well. There, Article IX, section 10, of the Illinois Constitution of 1870 required that property located within a municipal corporation be taxed uniformly. In 1970, the Illinois constitution was amended to give home rule units the power to make local improvements by special assessment and also "to levy or impose additional taxes upon areas within their boundaries in the manner provided by law for the provision of special services to those areas and for the payment of debt incurred in order to provide those special services." Ill. Const. Art 7, § 6(1). Thus, express constitutional authority allowed cities to create special service districts and to tax them at different rates.

The governing body of Oak Park, Illinois, enacted a series of ordinances "for establishing areas for the providing of special services and provided that the president and board of trustees of the Village of Oak Park shall be the governing body of the special service

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[5] As examples of special districts now permitted under Oregon law, *see, e.g.,* ORS ch 266, Park and Recreation Districts (authority to levy taxes granted by ORS 266.410(5)); ORS 267.510 to 267.650, Transportation Districts (taxing authority provided by ORS 267.620); ORS 440.305 to 440.410, Health Districts (taxing authority granted by ORS 440.395); and ORS 777.005 to 777.725, Ports (taxing power provided by 777.430). *See generally* ORS ch 198, Special Districts Generally, and *Reilly v. Paulus,* 288 Or 573, 607 P2d 162 (1980) (upholding a Metropolitan Service District created under ORS ch 268).

area. It authorized the levying of taxes by the village board on the property in the special service area. * * *" 296 NE2d at 346. The ordinances also provided for the creation of a shopping mall, landscaping, lighting, and for the imposition of a real estate tax against the property of the special service area for the purpose of purchasing parking lots.

For reasons not relevant to this opinion, the action of the village board was held to be invalid. The case illustrates, however, the point that in order to achieve a subdistricting scheme similar to the one involved in this case, a constitutional amendment was required.

The constitutions of other states contain provisions similar to Article I, section 32, and the courts of those states have construed such provisions to prohibit taxing districts based upon geographical lines.

Monaghan v. Lewis, 21 Del (5 Penne) 218, 59 A 948 (1905), is a case involving a law passed by the Delaware legislature which recited:

> "* * * whereas, all that portion of the city of Wilmington, bounded by Seventh Street on the south, Twelfth Street extended on the north, Woodlawn avenue on the east, and Greenhill avenue on the west, the same having but two dwelling houses erected thereon, and deriving no benefit from being within the limits of the said city, and will not derive any benefit for years to come * * *."

The law imposed taxes on the described area at a rate "not exceeding one-fourth of the regular rate levied on persons and estates in the remaining parts of the said city." Article 8, section 1, of the Delaware Constitution provided that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." The plaintiff contended that the act was unconstitutional and void under Article 8, section 1, because the tax was not uniform upon the same class of subjects within the territorial limits of the authority levying the tax. The Delaware

court held that the law was in direct conflict with the constitutional provision and was void.

Essex County Park Commission v. Town of West Orange, 77 NJL 575, 73 A 511 (1909) involved an act which exempted selected public lands from taxation. The New Jersey constitution directed that "property shall be assessed under general laws by uniform rules." This language had been construed to permit the exemption from taxation of property of various classifications. The challenged act provided that all lands which were the property of a taxing district, and located within the boundaries of the taxing district, were exempted from taxation. If the property owned by the taxing district was located outside the taxing district, it was taxable. The court reasoned that "[i]t is thus sought to form a class for taxation marked by the characteristic of location merely." 73 A at 513.

The New Jersey court struck down the law, saying:

> "To form a class with reference to the accident of the location of the property is to ignore the fact that differences in the amount of ratables in every taxing district make differences in the amounts assessed for township, county, and state taxes. Whether all property similarly used and possessing the same characteristics is included in the ratables should be the test of the generality of the law. * * *
>
> "Classification according to the location of the property is not a classification according to any feature inherent in the property itself, but with reference entirely to chance of location, a circumstance quite as disconnected with the characteristics of the property itself as its ownership * * *." 73 A at 513.

Accord, Baldwin Construction Co. v. Essex County Board of Taxation, 16 NJ 329, 108 A2d 598 (1954), which held that increased assessments in selected areas determined by "arbitrarily fixed geographical boundaries of necessity worked discrimination in respect of comparable properties immediately beyond the unreasoned and artificial borderline." 108 A2d at 603.

If the class is to be fixed with reference to unique characteristics, the classification should be described in those terms, not on geographical terms. Otherwise, any city could create a special taxing subdistrict on a geographical basis and later seek to justify the district on the basis of some "unique characteristics" which had no relevance to its creation. Requiring that the classifications be defined in terms of the unique characteristics of the property at least insures that the authority creating the special district considers those characteristics in determining the necessity for the district.

The record in this case also reflects arbitrary decisions made without reference to any objective criteria. A group of "business people" whose properties were within one block of the northern district boundary requested to have their properties included in the district. According to one of the city planners, these properties did not meet the "distance from the mall criteria [sic]," but the properties were included in the district, nonetheless. Other property owners whose properties met the criterion were excluded from the district because they did not want to be within the district.

I will concede that these variations may be minor. But a classification, the applicability of which depends upon such whims, cannot be valid.

I believe that the majority strains to reach a desired result because it is persuaded that the Eugene City Council has taken a dynamic step toward the solution of a problem chronic to our cities—core area decay—in order to achieve a socially desirable result. I am sympathetic with the goal sought to be attained. Unfortunately, Article I, section 32, expressly prohibits this action. Beyond that, however, the approach of the majority may create the foundation for ills which are more destructive than the ills sought to be cured.

2.

A policy underlying the "territorial limits" clause of Article I, section 32, is to prevent a majority from imposing tax burdens that should be uniformly distributed upon all, upon a minority within the territorial limits of the taxing authority. The imposition of a tax burden only upon those owning property or operating businesses within a geographical area, when similar property exists outside the geographical area but within the taxing district, is improper and violates the uniformity clause.

The primary reason justifying the action taken by the city is that a general benefit to the city will result. The majority, at ____ Or ____ (pages 12-13 of the slip opinion) states:

> "* * * We agree with the circuit court that the City has shown that there would be a general benefit to the economy of the City as a result of the economic improvement of the City's central business district. Thus the City's program of free parking and District advertising serves a legitimate public purpose. * * *"

In a very real sense, only the property owners, merchants and business people in the District are being taxed and deprived of their parking in order to create a "benefit to the economy of the City as a result of the economic improvement of the City's central business district."

Some contend that the burden of taxes should be imposed according to the benefit which each taxpayer receives from the protection afforded by the government. But almost universally, the public policy of uniformity prevails over the public policy of taxation according to the benefit received.

> "But notwithstanding the rule of uniformity lying at the basis of every just system of taxation, there are doubtless many individual cases where the weight of a tax falls unequally upon the owners of the property taxed. This is almost unavoidable under every system

> of direct taxation. But the tax is not rendered illegal by such discrimination. Thus every citizen is bound to pay his proportion of a school tax, though he have no children; of a police tax, though he have no buildings or personal property to be guarded; or of a road tax, though he never use the road. In other words, a general tax cannot be dissected to show that, as to certain constituent parts, the taxpayer receives no benefit. Even in case of special assessments imposed for the improvement of property within certain limits, the fact that it is extremely doubtful whether a particular lot can receive any benefit from the improvement does not invalidate the tax with respect to such lot. * * *" *Union Transit Co. v. Kentucky,* 199 US 194, 203, 26 S Ct 36, 50 L Ed 150 (1905).

The district in this case was created by a vote of the voters of the entire city, and the tax was imposed by a vote of the elected representatives of the voters of the entire city. Beyond question, and in every sense, the majority is imposing a tax upon the minority which (to use the language of the majority opinion) will "benefit * * * the economy of the [entire] City."[6]

Unquestionably, the essence of the democratic process is the sovereignty of the majority. The interests of the many are preferred to those of the few.[7] In that sense, the minority is subject to the will of the majority.

But it is equally well settled that the majority cannot, without restriction, impose economic, social, or political burdens upon the minority that are not common to all. The majority's holding permits the imposition of excessive tax burdens upon the minority.

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[6] According to one witness, it was a "community [goal] of the City of Eugene."

[7] "The majority * * * exercise a prodigious actual authority * * *; no obstacles exist which can impede or even retard its progress, so as to make it heed the complaints of those whom it crushes upon its path * * *." A. De Tocqueville, Democracy in America 327 (1898 ed).

John Stuart Mill wrote:

> "* * * [I]n political speculations, the 'tyranny of the majority' is now generally included among the evils against which society requires to be on its guard
>
> "* * * * *.
>
> "* * * All that makes existence valuable to any one, depends on the enforcement of restraints upon the actions of other people * * *."[8]

The restraint placed upon the legislature is normally found in the state's constitution. Alexander Hamilton referred to restriction of popular government under a constitution so as to secure the protection of the individual's rights from the majority.[9]

The majority's recognition that the language of Article I, section 32, "was intended to prevent anyone from escaping his just share of the tax burden" necessarily includes a recognition that no one should bear more than his or her "just share" of the tax burden. ____ Or at ____. (slip opinion at 15).

The evils which Article I, section 32, seeks to avoid (one being discriminatory taxation) are too easily attained by permitting a "classification" defined only by geographical area. Requiring the class to be defined other than by geographical area (as by zone, or type or nature of property) is not onerous and insures that the generality of the law which the constitution intends to insure, is maintained. Differential classifications should be determined by the use of property or by characteristics of the property, not by location. If a tax is imposed by reason of the location of property, some basis for the classification, apart from location, should be apparent from the law itself, rather than by reference to extrinsic matters. If the tax subdistrict is described geographically, some justifiable basis for the

[8] J. S. Mill, On Liberty (1859), in Prefaces to Liberty 244-245 (B. Wishy ed 1959).

[9] *See* G. Dietze, The Federalist 148 (1960).

classification, apart from location, should be apparent from the law itself.

If a qualitative class is to exist, the class must be determined by qualitative factors. And if the classification is to have validity, those qualitative factors must be set forth in the law itself.

Justice Jackson, concurring in *Railway Express v. New York,* 336 US 106, 112-113, 69 S Ct 463, 93 L Ed 533 (1949), opined:

> "* * * The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation."[10]

Strict adherence to Article I, section 32, guarantees that taxation not be the means to unfairly oppress a minority.

Lent, J., joins in this dissent.

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[10] As to the equal protection aspects of taxation uniformity and the relationship between the Oregon Constitution and the Fourteenth Amendment to the Constitution of the United States, O. Etter, in *Municipal Tax Differentials,* 37 Or L Rev 1, 37-38, (1957), has advanced trenchant arguments which I neither accept nor reject at this time.

B. Trial Court's Opinion.

IN THE CIRCUIT COURT OF THE STATE
OF OREGON FOR LANE COUNTY

MICHAEL F. JARVILL, Plaintiff, vs. THE CITY OF EUGENE, et al., Defendant.	
KENNETH LICHTY, Plaintiff, vs. THE CITY OF EUGENE, et al., Defendant.	Case No. 74 2508
CITY OF EUGENE, a Municipal Corporation of the State of Oregon, Plaintiff, vs. GREAT WESTERN SCHISM, INC., an Oregon corporation, Defendant.	

OPINION, FINDINGS AND CONCLUSIONS

BACKGROUND

In 1973 the City of Eugene adopted a charter amendment authorizing the city council to establish a Downtown Development District. Eugene Charter, Ch. VII, §48 (70) (1973). The city council subsequently enacted a series of ordinances establishing the D.D.D. and specifying its functions and powers. Among these are ordinances regulating vehicle parking and ordinances imposing an ad valorem tax on real property or the ownership of real property in the D.D.D., and a business-occupation tax on economic enterprises within the District. Eugene Code, 1971 §§2.308-2.390, 3.700-3.720.

Plaintiffs in the cases of Michael E. Jarvill v. The City of Eugene and Kenneth Lichty v. The City of Eugene seek a declaratory judgment that the

ordinances be declared void and unconstitutional and that the city be restrained and enjoined from enforcing them. The answer of the defendants to the second amended complaint in each case contains a general denial and raises the affirmative defense of laches.

In the case of City of Eugene v. Great Western Schism, Inc. plaintiff seeks to recover unpaid D.D.D taxes from a retail store located within the District. Defendant demurred to plaintiff's complaint. The three cases were consolidated for trial. Ruling on the city's demurrer in Great Western Schism, Inc. was deferred until ruling on the other two cases.

The legal issues raised by these cases will be considered within the following organizational framework.

I. Laches

II. Validity of the D.D.D. (Downtown Development District) as a legal entity

III. Validity of the taxation provisions of the D.D.D. program

a. authority to impose

b. delegation

c. equal protection; equal privileges and immunities; uniformity of taxation

d. taxation without consent

e. exercise of police power

f. Article XI, §9; public purpose doctrine

g. tax imposed on one district for the benefit of another

h. shifting of overpark assessment

i. privilege against self-incrimination.

IV. Validity of the parking provisions of the D.D.D. program

a. void for vagueness

b. equal protection

c. deprivation of property without due process of law

d. right of travel

V. Other bases for challenging the program

a. Motor Vehicle Parking Facilities Act

b. ORS 221.480 - 221.500

I. Laches

The burden is upon the city to show circumstances amounting to laches. Hanns v. Hanns, 246 Or 282, 306 (1967). The city must show that the plaintiffs unreasonably delayed in asserting their claimed rights. Moreover, this delay must have resulted in such substantial

prejudice to the city that it would be inequitable to afford the relief sought. Stephan v. Equitable S & L Assn., 268 Or 544, 569 (1974); Dahlhammer v. Schneider Exec., 197 Or 478, 498 (1953).

The city's brief suggests that plaintiffs should have contested the validity of the D.D.D. scheme before the city was committed to instigating the program. The ordinance which was central to the D.D.D. program was enacted in August, 1973. Eugene Ordinance No. 16904. Prior to that time plaintiffs could not have had the full knowledge of all the facts which is required before laches begins to run. Stephan, supra, at 569. The complaints in Jarvill and Lichty were filed May 20, 1974. A lapse of some nine months between the institution of the program and the initiation of these challenges to it is

not, on its face, of sufficient duration as to constitute an unreasonable delay.

It is alleged that the city has incurred substantial expenses in initiating and maintaining the D.D.D. program and that financial investment may be lost due to the unreasonable delay of the plaintiffs in filing their complaints. If this contention were to be upheld it would mean that a governmental unit could defeat virtually any challenge to its actions merely by pointing to the time and money invested in effectuating that action. It may well be that the city would suffer some economic detriment were the D.D.D. program now to be overturned. But a successful challenge to nearly any governmental action may entail adverse financial consequences to that entity. This factor alone should not be a sufficient basis

for applying the doctrine of laches.

The city has neither demonstrated that the plaintiffs were guilty of unreasonable delay nor that the delay resulted in such substantial prejudice to the city that it would be inequitable to grant the relief sought. The doctrine of laches is not a bar to plaintiffs' claims.

II. Validity of the D.D.D. as a legal entity

The initial inquiry is whether the D.D.D. is a lawfully created entity. Article IV, §1 (5) and Article XI, §2 of the Oregon Constitution constitutes a grant of home rule power to municipalities. Beaverton v. I. A. Fire Fighters, 20 Or App 293, 299 (1975). This grant is construed to make available to cities all of the powers which the legislature could validly confer upon them. City of

Idanha v. Consumers Power, 8 Or App 551, 559 (1972). There must also exist a city charter defining the extent to which a municipality has chosen to exercise the powers granted it by the constitution. Beaverton, supra, at 300. The Eugene City Charter was amended to give the city the authority to establish the Downtown Development District. That amendment confers upon the city council the following powers:

> To establish, and from time to time to change the boundaries of, a downtown development district; for the purposes of public parking facilities for vehicles in the district, of public transportation in, to, and from the district, and of economic promotion and development for the district, to tax persons, property, and economic enterprise in the district; and to establish one or more agencies to assist the City in the exercise of those powers. Eugene Charter, Chapter VII, §48 (70) (1973).

Thus the general constitutional grant

of power in conjunction with the charter amendment specifically establishing the D.D.D. are sufficient legal authority for the creation of the D.D.D. Contrary to the contention that the very existence of the District is illegal the D.D.D. is authorized by law.

III. Validity of the taxing provisions

a. authority to impose

We therefore turn to the question of whether the city has the power to impose the taxes challenged in these three cases. The Oregon Supreme Court has said,

> It is universally recognized that municipal corporations created to provide general governmental services have the power to impose taxes and to select the kind of tax that the governing body of the city considers the most appropriate. Horner Market v. Tri-County Transporation District, 256 Or 124, 131 (1970).

The right of taxation can be exercised by a city only in the manner and to the extent defined by its charter, and a tax must always be supported by an express or necessarily implied grant of power. Corbett v. City of Portland, 31 Or 407 (1897). It is not necessary to find an implied grant of power to support the taxation as there is a charter provision which explicitly authorizes D.D.D. taxes. Eugene Charter, Chapter VII, §48 (70) (1973). Thus the city has the power, pursuant to the charter amendment, to levy those taxes.

b. delegation

The real issue is not whether the city has the power to impose the D.D.D. taxes. The critical inquiry is whether the city has in some way improperly exercised that power. In this context it is claimed that there is an unlawful

delegation of the taxing power by the City of Eugene to the Downtown Development Board (D.D.B.).

However, the Eugene City Council has not delegated any taxing power to the Downtown Development Board. The D.D.B. is authorized to prepare and submit to the city finance department a budget for the D.D.D. programs. The D.D.B. is also directed to submit a proposal for the rates of the ad valorem and business-and-occupation taxes. Eugene Code 1971, §2.387; Tr. 159. But there is no requirement that the city must adopt the tax rates as proposed by the D.D.B. The city council is the entity that establishes the rates and levies the taxes. Eugene Code, 1971 §§3.700, 3.715, 3.750, 3.760. The council has not delegated to the D.D.B. the power to tax, hence no issue exists

as to whether such a delegation would be lawful.

c. equal protection; equal privileges and immunities; uniformity of taxation

The taxing scheme at issue in these cases taxes persons and property within the Downtown Development District but does not tax persons and property throughout the rest of Eugene. The parties challenging the validity of the scheme allege that the tax differential violates four constitutional provisions: the equal protection clause of the United States Constitution [14th Amendment]; the privileges and immunities clause of the Oregon Constitution [Article I, §20]; and the two Oregon Constitution provisions requiring uniformity and equality in taxation [Article I, §32; Article IX, S1].

In their application to tax differentials each of these constitutional provisions has substantially the same bearing. The Oregon constitutional restrictions with regard to equality and uniformity are the same as the restrictions imposed on the states by the equal protection clause of §1 of the Fourteenth Amendment to the United States Constitution. Sproul v. State Tax Commission, 234 Or 579, 607 (1963) (specifically concurring); In Re Estate of Heck, 120 Or 80, 86 (1926); Standard Lumber Co. v. Pierce, 122 Or 314, 333 (1924). The Supreme Court of Oregon has also stated that Article I, §20 of the State Constitution (the equal privileges and immunities clause) is the counterpart of the equal protection clause of the Federal Constitution. "The tests, as to both, are substantially similar."

State v. Savage, 96 Or 53, 59 (1919); Nilsen v. Davidson Industries, Inc., 226 Or 164, 169 (1961). Since the tests of the validity of tax differentials are substantially the same for the four constitutional provisions cited above, the validity of the taxing scheme under each of these provisions can be treated essentially as a single issue.

What, then, are the standards by which the taxing scheme is to be measured under these four constitutional provisions? It should be noted initially that classification of subjects for tax purposes is clearly permissable. In Re Heck's Estate, 120 Or 80, 86 (1926); Standard Lumber Co. v. Pierce, 112 Or 314, 327 (1924). Moreover, a legislature has extremely broad latitude to classify subjects for taxation purposes. The Oregon Supreme

Court has noted that the Supreme Court of the United States has repeatedly indicated that in taxation there exists a broader power of classification than in some other exercises of legislative power. Standard Lumber Co., supra, at 327.

A municipality, in the exercise of its power to tax, must be free to select subjects of taxation and grant exemptions. Rational inequalities resulting from singling out particular classes for taxation or exemption infringe no constitutional limitation. The equal protection clause does not impose any rigid rule of equality in taxation. Wittenberg v. Mutton, 203 Or 438 (1955).

The tests regarding the power to classify and then to tax have been expressed in various ways by the Oregon court. It has been said that the consti-

tutional limitations prohibit only classifications that are "manifestly arbitrary and capricious." Sproul v. State Tax Commission, supra, at 608 (specifically concurring). A classification which has a reasonable relation to some permissable governmental action is valid. Standard Lumber Co., supra, at 328. When a court reviews the validity of a classification if any facts can reasonably be conceived which will sustain the classification the existence of those facts must be assumed. Allied Stores of Ohio v. Bowers, 358 US 522, 528, 79 S.Ct. 473, 3 LEd 2d 480 (1959); Horner's Market v. Tri-County Trans., 20 Or App 288, 307 (1970); Garbade v. City of Portland, 188 Or 158, 191 (1950). A court will strike down a classification only when it can say that there is no reasonable justification for

the discrimination. Wittenberg v. Mutton, supra, at 446.

The above standards are in accord with the rules in other jurisdictions.

A very great discretion is accorded by the courts to local government authorities in classifying persons, properties and activities for purposes of taxation, and courts will customarily respect such discretion if there is any reasonable basis to support the differential treatment. 2A Antieau, Local Government Law, §21.47 (1976).

These standards are articulated in language which allows considerable discretion to a legislative body to classify persons and property for taxation purposes. Moreover, the judicial review of such a classification is rather limited. Only if a classification is

arbitrary or lacks any reasonable justification will it be invalidated. Only if a court is unable to postulate any reasonable facts to support the classification will the taxing scheme be stricken.

Applying the above standards to the challenged taxing scheme it would appear proper to sustain the classification established by the Eugene City Council for purposes of taxation. However, a significant problem remains despite these standards granting considerable latitude to a legislative taxation classification. Although the Oregon court has indicated it will utilize essentially the same standards for determining the validity of a legislative classification under each of the four constitutional provisions cited above, one of those provisions

nevertheless presents significantly more difficulty than the others. Article I, §32 of the Oregon Constitution reads, "All taxation shall be uniform on the same class of subjects within the territorial limits of the authority levying the tax." The authority levying the tax in question is the City of Eugene. Thus the Oregon Constitution requires that within the territorial limits of Eugene all taxation must be uniform on the same class of subjects.

The parties who challenge the validity of the tax argue that Article I, §32 prohibits the Downtown Development District from being taxed at a different rate than the rest of the city. They contend that a tax must apply uniformly to a particular class of subjects throughout Eugene. Thus, for example,

businesses located within the D.D.D. cannot be taxed at a different rate than similar businesses located elsewhere in the city. A tax must be applied to a particular class throughout the city uniformly, it cannot be imposed on certain members of that class and not on others.

The city responds that a different interpretation of Article I, §32 is possible. It is contended that nothing in that provision prohibits a governmental entity from dividing itself into taxing districts. Article I, §32 only requires that within such a taxing district each class must be treated uniformly. Thus the city can establish a special taxing district and tax persons and property within that district at a different rate than persons and property throughout the rest of Eugene, but within the special

taxing district each class of subjects must be taxed uniformly.

Those who challenge the tax cite the cases of Yamhill County v. Foster, 53 Or 125 (1909) and State ex rel Welfare Commission v. County Court of Malheur County, 185 Or 392 (1949) in support of their position that the city's reading of Article I, §32 is incorrect. However, the constitutional interpretation urged by the city is not inconsistent with those cases. Those cases say that the rate of taxation must be uniform throughout the taxing district, whether state or local. Yamhill County, supra, at 129; Malheur County, supra, at 411. If the taxing district is the Downtown Development District those cases require only that taxation be uniform on the same class of subjects throughout that district.

Thus, in determining whether the city's interpretation of Article I, §32 is permissable the key inquiry is: can a city establish a special taxing district within its boundaries without violating that constitutional provision? If such a district can be formed the Oregon Constitution and the Yamhill and Malheur cases require only that each class within that district be treated uniformly.

Authority in other jurisdictions on this issue is inconclusive. Some jurisdictions do not permit a governmental entity to establish a taxing district smaller than the political boundaries of that entity. E.g., State v. Inhabitants of Township of Raritan, 19 Atl. 619 (NJ Supr. Ct. 1890). Other jurisdictions have upheld various types of municipal tax differentials, even when challenged under

the equal protection clause or state constitutional provisions requiring uniformity of taxation. E.g., Moore v. Town of Stamford, 54 A. 2d 589 (Conn. 1947); Daly v. Morgan, 16 Atl. 287 (Md. 1888). See Etter, Municipal Tax Differentials, 37 Ore. L. Rev. 1 (1957).

No cases involving precisely the issue considered herein have been found or cited to the court. Taxing schemes similar to the D.D.D. program were challenged in two relatively recent cases. An Illinois municipality established a special service district and imposed a tax on property in that district to finance a shopping mall and free offstreet parking. In striking down the tax district the court relied upon a clause of the Illinois Constitution which has no counterpart in the Oregon Constitution.

That provision was held to require specific enabling legislation in order to create a special taxing district. Oak Park Federal Savings & Loan Ass'n v. Village of Oak Park, 296 N.E. 2d 344 (Ill. 1973).

It is noteworthy that in the cases at bar enabling legislation exists and a special taxing district was in fact created. It would seem that if the Illinois Constitution did not contain the particular provision mentioned above, or if legislation had been enacted to create a special taxing district, the Illinois court would have upheld the Oak Park scheme.

A case involving issues more closely akin to those considered herein is Hart v. Columbus, 188 S.E. 2d 422 (Ga. App. 1972). In that case the charter of a

consolidated city-county goverment provided for the division of its territory into taxing districts with ad valorem taxes varying according to governmental services rendered within each district. The court upheld the scheme, finding that it was reasonable and that it violated neither the equal protection clause nor the due process clause. Although the Oak Park and Hart cases are distinguishable from the instant cases they suggest judicial approval of taxing schemes not unlike the Downtown Development District program. In Hart the court commended the taxation scheme as an innovative approach to dealing with the complex problems of local government.

There do not appear to be any Oregon cases dealing with the municipal taxing districts. However, several cases have

upheld tax differentials operating at the county and state levels. Cook v. Port of Portland, 200 Or 580 (1891); Rankin v. Yoran, 72 Or 224 (1914); State ex rel Public Welfare Commission v. County Court of Malheur County, 185 Or 392 (1949); Horner's Market v. Tri-County Transportation Dist., 2 Or App 288 (1970), aff'd 256 Or 124 (1970). The court's reasoning in these cases appeared to be that if a class of taxpayers derive some particular advantage or special benefit from the expenditure financed by the tax, those taxpayers can be required to bear the additional financial burdens imposed by the tax. Etter, supra, at 54-56. Thus special benefits inuring to a particular class from the expenditure of public funds can be a valid basis for tax differentials, notwithstanding Article I, §32.

An Attorney General opinion dealing with county taxing districts is relevant to the problem considered herein. The following was among a series of questions dealt with in a 1968 opinion:

> Can a county levy a different rate of county ad valorem tax upon different areas within its boundaries if the difference is based upon whether particular county services are provided the particular area being taxed?

The opinion quoted Article I, §32 and cited the rule that the rate of taxation must be uniform throughout the taxing district. It concluded that the Oregon Constitution would prohibit a county from adjusting its tax levy in various areas depending upon the degree of county services received by residents of those areas. However, the opinion went on to suggest the possibility of establishing a statutory procedure whereby various

service districts would be formed in order to provide special services not provided for other parts of the county. Such service districts could also serve as taxing districts. 34 Op. Att'y Gen. 356 (1968).

The procedure suggested by that opinion appears similar to that followed by the city of Eugene. The city has enacted a series of ordinances establishing a district which provides special services not provided for the rest of the city (i.e., the free parking program). The tax is limited to persons and property within that district. Thus the above cited opinion can be read so as to support the taxing scheme promulgated by the city of Eugene.

Even more instructive is a 1971 opinion of the Attorney General which

considered whether a proposed statute which would allow a city to establish within its boundaries separate taxing districts, and to prescribe different tax rates for those districts based upon the services rendered within them, would be constitutional under Article I, §32. The scheme envisioned by that statute was similar to the D.D.D. program in that the municipal corporation would be the entity imposing the varying rates on different taxing districts within the city's boundaries. The individual districts would not themselves be the entities levying the taxes. That opinion concluded that Article I, §32 prohibits a classification based solely on geographical location. However, it does not prohibit a classification in which location is a consideration, as long as the classification

has some other rational basis. A classification for tax purposes based upon services rendered to a particular municipal area would probably be permissable. Article I, §32 would require only that all property within a given classification be subject to taxation at a uniform rate. The proposed statute was said to probably be constitutional. 35 Op. Att'y Gen. 660 (1971).

Thus the opinions of the Attorney General which have considered the validity within its boundaries without violating Article I, §32, at least if the municipality bases the tax differential upon special benefits conferred upon that district. This reasoning comports with what appears to be the majority rule. It is said that where the disparity between different areas is plain and palpable

a legislative body can create a taxing district for particular purposes within a city without regard to existing political subdivisions. State and Local Taxation §152 at 473 (1976); accord, I Cooley, Taxation 673-674, 685-686 (4th ed. 1924).

The principles regarding taxpaper classification which have been articulated by the Oregon Supreme Court, the Attorney General opinions discussed above and the decisions in other jurisdictions which have upheld the validity of taxing districts gravitate toward the conclusion that the taxing scheme challenged in these cases does not violate the second clause of Article I, §32. The uniformity requirement does not forbid a taxing district within the city's boundaries, particularly if the classification is predicated upon some rational basis other than geographic

location. Article I, §32 merely requires that within such a taxing district each class must be taxed uniformly.

Even if the hurdle presented by the second clause of Article I, §32 is surmounted, the taxing scheme must still satisfy the general tests set forth above with regard to the equal protection clause, the equal privileges and immunities clause and the uniformity provisions of the Oregon Constitution. It will be recalled that under the standards articulated by the Oregon courts, if any reasonable basis exists to support the taxation classification it will be upheld. (See cases cited above at p. 6).

What reasonable basis can be conceived to sustain the taxation of the Downtown Development District at a higher rate than the rest of the city? As noted

above persons and property can be validly classified for taxation purposes on the basis of benefits they receive from the expenditure of public funds.

The city council concluded that the Downtown Development District would receive special benefits from the free parking program. The evidence indicates that the council believed the expenditures to finance the parking program would promote the vitality of the downtown area. It would do so primarily by encouraging citizens to travel downtown for the purposes of retail shopping, transacting business and purchasing services. By increasing the downtown area's attraction to consumers the business revenues of that area would rise, property values would increase and the tax base would not erode. The deterioration of the urban core area which has

occurred in some other cities would be forestalled.

The evidence shows that if the free parking program encourages consumers to take their business downtown, those in the urban core area would benefit. For example, there is evidence regarding direct financial benefit to merchants resulting from the program (Tr. 124); evidence regarding increase in land values in the D.D.D. (Tr. 128); and evidence that the free parking program was a significant factor in the decision of a business owner to locate his retail store in the downtown area (Tr. 120).

It is not necessary that the benefits from the expenditures be confined exclusively to the D.D.D. in order for special benefits to constitute a valid basis for the taxation discrimination.

It is sufficient if there is a general benefit to the city but a particular benefit to the D.D.D. I Cooley, Taxation, §315 (4th Ed. 1924).

Nor is it necessary that there be identical, direct or immediate benefits to all who are taxed. In Horner's Market v. Tri-County Transportation Dist., 2 Or App 288, 308 (1970) the court held that although not all who were taxed would receive identical benefits, all in the taxing district would receive some benefits, direct or indirect, either concurrently or in the future.

In determining the constitutionality of the taxing scheme the court does not substitute its judgment for that of the city council. The standard of judicial review is merely to determine whether the classification has a reason-

able relation to a legitimate governmental objective. The objective is to prevent the deterioration of the urban core area of Eugene. If the taxation classification of the Downtown Development District has a reasonable relation to that goal it must be sustained. It seems clear that the council had a reasonable basis for believing the free parking program would encourage consumers to obtain goods and services in the downtown area and furthermore that those who operate commercial enterprises or who own property in that area would benefit thereby. Since those upon whom the tax is imposed derive some special benefits from the free parking program which is financed by the tax, those benefits constitute a reasonable basis upon which to single out that class for taxation.

Additionally another rational basis exists to justify the classification. There is evidence that the D.D.D. is an area whose particular circumstances and problems distinguish it from the rest of the city. (Tr. 188, 191-193, 198-201). These distinctive factors in the urban core area provided a rational basis for the taxation classification since the tax revenues are utilized to finance a program intended to deal with those unique problems.

The parties challenging the taxing scheme cite the case of State v. Wright, 53 Or 344 (1909) which held that a statute imposing special burdens upon persons engaged in substantially the same business, under the same conditions, is unconstitutional class legislation. It is argued that a tax is imposed on

professionals within the D.D.D. but not on those engaged in the same business located outside the D.D.D. and hence the tax is invalid under the reasoning of Wright. However, that holding was limited to a statute which distinguished among similar businesses operated under the same conditions. Wright, supra, at 348. The evidence indicates that the businesses, both professional and non-professional, in the Downtown Development District operate within the framework of different conditions and circumstances than do businesses outside the urban core area. (Tr. 188, 191-192). Thus the Wright holding is not dispositive of the present issue.

The court is of the opinion that the distinctive nature of the downtown area as well as the benefits accruing

to that area from the tax revenue expenditures provide a rational basis for singling out the Downtown Development District for taxation. The court further concludes that the city council's findings regarding these matters and the ordinances developed to meet these problems are not arbitrary.

The conclusion that the D.D.D. taxation scheme satisfied the rational relation test is further supported by the case of Horner's Market v. Tri-County Transporation District, 2 Or. App. 288 (1970), aff'd, 256 Or 124 (1970). In that case an employer payroll tax levied by the Tri-County Metropolitan Transportation District was challenged. Plaintiffs argued that placing the major tax burden on one group of taxpayers (employers) denied them equal protection of the laws. They also

argued that the tax violated the constitutional guarantees of uniformity of taxation. The court rejected both arguments and upheld the constitutionality of the tax. The court stressed the wide discretion of the legislature in classifying subjects for taxation purposes and it reiterated the test cited above with regard to judicial review of such a classification.

In conclusion, the Downtown Development District taxing scheme can withstand the challenges discussed above under the equal protection clause of the Federal Constitution and the equal privileges and immunities clause and the uniformity provisions of the Oregon Constitution.

The parties challenging the tax also argue that it improperly classifies <u>within</u> the D.D.D. Professionals who

operate within the D.D.D. are taxed at a flat rate; taxation of the merchants within the District is based upon a percentage of sales; and yet another formula is utilized to compute the taxation of owners of property within the District. The arguments advanced are that the differing treatment of these groups constitutes a denial of equal protection of the laws, contrary to the Fourteenth Amendment, and also that this disparity in taxation formulas violates the equal privileges and immunities clause of the Oregon Constitution, Article I, §20. These contentions are advanced particularly on behalf of those categorized as professionals.

As discussed above the tests under these two constitutional provisions are substantially the same. The essential

inquiry is whether there is any rational basis for the differential treatment. If any reasonable facts can be conceived which will support the classification it will be upheld. Standard Lumber Co. v. Pierce, supra; Smith v. Columbia County, 216 Or. 662 (1959).

What reasonable basis could justify the different treatment accorded the various classes within the Downtown Development District? Several possibilities can be suggested. The court could conceive that the three groups within the D.D.D. classification (property owners, professionals, non-professional business enterprises) are taxed approximately in proportion to the benefits they are likely to receive from the parking program.

Or the court could view the D.D.D. taxing scheme as involving a two level

classification. That is, the initial distinction is between all D.D.D. property owners and all other types of business enterprises in the District. The property owners are subject to an ad valorem tax, the non-property owners are not. The classification has a rational basis because the nature of the economic activity of property owners differs from that of non-property owners. Within the category of non-property owners a further classification is made between professionals and non-professional businesses. The court could conceive that the differing tax rates on each of these two groups were calculated to approximately raise the amount of revenue necessary to finance sufficient parking spaces to meet the requirements of each business enterprise.

The evidence shows that the city

council believed it would be reasonable to expect each professional person to finance the expense of providing one parking space. The council then calculated the approximate cost of one space and set the flat rate tax on professionals at that sum. (Tr. 94-95, 147-148.) Such a process indicates that the taxation classification was not arbitrary and had some rational basis and that is all that is required to sustain the classification. See cases cited supra at p. 6.

Since the court is of the opinion that a rational basis exists for the classification of the three groups within the D.D.D. the taxation differential among those groups does not constitute a denial of equal protection nor a violation of the equal privileges and immunities clause.

d. taxation without consent

It is claimed that the D.D.D. tax is imposed without the consent of the people or their representatives, contrary to Article I, §32 of the Oregon Constitution. In Horner's Market v. Tri-County Transportation District, 2 Or. App. 288 (1970), aff'd, 256 Or.124 (1970) the court considered the validity of a statute which provided for the creation of a taxing district without a vote of the citizens of the district and for designation of the governing body of the district by the governor without such a vote and for levy by that body of an employer's payroll tax without a vote either of the district's citizens as a whole or a vote of the affected employers. In rejecting the contention that the payroll tax violated the "consent" clause of Article I, §32 the court said "All of

the people in the district were represented in the legislature". Horner's Market at 306.

In Ratigan v. Davis, 122 N.W. 2d 12 (Neb. 1963), appeal dismissed 375 U.S. 394 (1964), a school tax was imposed upon people in a newly annexed area of Omaha without their consent or vote. The claim of taxation without representation was rejected.

In both Horner's Market and Ratigan the challenging taxpayers were not allowed to vote on the levying of the tax. In the present cases those affected by the tax not only are represented on the Eugene City Council, they also were able to vote on the ballot measures authorizing the tax proposed by the city council. These facts, therefore, present an even stronger case than did the facts of

those two cases for concluding that the D.D.D. tax is not unconstitutionally imposed without the consent of the people or their representatives.

e. exercise of police power

It is asserted that the ordinances which created the D.D.D. and established the taxing scheme and parking program are invalid because, although enacted under the guise of the city's police powers, they are not regulatory but are primarily for the purpose of raising revenue. This argument is predicated upon the proposition that an ordinance which constitutes a revenue measure in the guise of an exercise of the police power is invalid. Annot, 83 ALR 2d 625, 628 (1962); Hickey v. Riley; 177 Or. 321, 334 (1945) (by implication).

The above contention overlooks the

fact that the various ordinances have different purposes. The ordinance which regulates parking in the Downtown Development District is an exercise of the police power. Eugene Code, 1971 §5.232. The taxing ordinances do not purport to be regulatory measures, their purpose is to raise revenue. Eugene Code, 1971 §3.700-3.765. The combination of a police regulation and an exercise of the taxing power in a single statutory scheme does not render it invalid. State v. Preston, 103 Or. 631 (1922).

It is further suggested that economic considerations provided the motivation for the parking regulation and this constituted an invalid exercise of the police power. However, the police power is not limited to the protection of the public health, safety and morals.

16 Am Jur 2nd Constitutional Law §311 (1964). Under the police power the government may adopt whatever economic policy may reasonably be deemed to promote public welfare and may enforce that policy by legislation adapted to its purpose. Savage v. Martin, 161 Or. 660, 677 (1939). Thus even if it is conceded that the parking ordinance was motivated by economic concerns it is a valid exercise of the city's police power. And since the taxing scheme was not enacted under the guise of the police power, the challenge considered herein to the validity of the ordinances must fail.

f. Article XI, §9; public purpose doctrine

The Downtown Development District is challenged on the basis that it violates Article XI, §9 of the Oregon

Constitution. That provision prohibits a city from holding stock in, raising money for, or loaning its credit to, a joint company, corporation or association. §2.389 of the Eugene Code, 1971, provides that all proceeds from the D.D.D. taxes shall be credited to the Downtown Development Fund. This fund is to be expended exclusively to finance a program of economic promotion and development and a parking program in the D.D.D. These expenditures are to be made in accordance with directions by the Downtown Development Board. Moreover, the D.D.B. budgets a portion of the Downtown Development Fund to the Eugene Downtown Association. That money is used by the Association for the promotion of the downtown area. (Tr. 109, 162). The parties challenging the tax claim the

effect of this procedure is that the city raises money which is utilized to promote and benefit downtown businesses.

A closely related challenge is predicated on common law principles rather than a constitutional provision. The Oregon Supreme Court recognizes the rule that public funds cannot be expended for other than a public purpose. Carruthers v. Port of Astoria, 249 Or 329, 333 (1968). It is argued that the city is not utilizing the D.D.D. tax revenues for a public purpose, but instead is spending those funds for a private purpose, to promote downtown commercial enterprises.

A very similar issue with an analogous fact situation was considered in a 1972 opinion of the Attorney General. The issue there was whether disbursements

of money by the Multnomah County Commission to the Portland Freight Traffic Assocation was a violation of Article XI, §9. The P.F.T.A. is a private, non-profit organization. Its purpose is to promote the interests of shippers in the Portland-Vancouver metropolitan area. The Multnomah County Commission budgets to the P.F.T.A. funds which are used to finance promotional activities. The similarity of that arrangement to the financial relationship between the Eugene council and the Downtown Development Board is apparent. The Attorney General concluded that the disbursements did not conflict with Article XI, §9, nor did they violate the public purpose rule. 35 Op. Att'y Gen. 1185 (1972).

Article XI, §9 prohibits financial aid by a municipality to a private body.

Carruthers, supra, at 340; Hauke v. Ten Brook, 122 Or 485, 491 (1927). That prohibition had its genesis in the nineteenth century when many municipal corporations gave money, credit or other financial benefits to railroads to induce them to locate in that area. If the railroad subsequently failed to satisfy its obligations the taxpayers were required to pay for the defaults. Therefore restrictive provisions such as Article XI, §9 were enacted to protect the sources of public revenue from such hazards. Carruthers, supra, at 334-336; Security Co. v. Baker County, 39 Or 396, 406 (1901); 4 Antieau, Local Government Law, §§43.01-43.02 (1966).

If a financial arrangement between a public body and a private entity does not present the evils intended to be

avoided by the constitutional prohibition the arrangement is not prohibited. Only those arrangements which fall within the reason for the prohibition are forbidden and "the reason failing, the rule is inapplicable." Security Co., supra, at 337.

Thus a financial arrangement which does not expose the taxpayers to potential hazard is not within the Article XI, §9 prohibition. That provision does not prohibit a public entity from entering into a financial arrangement with a private body whereby the public is to receive some benefit in exchange for public funds. 35 Op. Att'y Gen. 1185, 1190 (1972).

The economic relationship which is challenged in the present case does not expose the taxpayers to any risks. Even if the funds allocated to the D.D.B.

were mishandled no additional obligation or burden upon the taxpayers would result. There does not appear to be any way by which taxpayers may be held accountable through further taxation or otherwise. Carruthers, supra, at 339. Since the financial arrangement between the city and the Downtown Development Board does not fall within the type of evil which Article XI, §9 seeks to prevent it does not come within that constitutional prohibition. Moreover, the financial arrangement involves public benefit resulting from the expenditure of public funds. (Those public benefits are explored more fully in the public purpose discussion below). This criteria was stressed by the Attorney General as a basis for upholding a similar financial arrangement. 35 Op. Att'y Gen. 1185,

1190 (1972).

The economic relationship which is challenged in the present case does not expose the taxpayers to any risks. Even if the funds allocated to the D.D.B. were mishandled no additional obligation or burden upon the taxpayers would result. There does not appear to be any way by which taxpayers may be held accountable through further taxation or otherwise. Carruthers, supra, at 339. Since the financial arrangement between the city and the Downtown Development Board does not fall within the type of evil which Article XI, §9 seeks to prevent it does not come within that consititutional prohibition. Moreover, the financial arrangement involves public benefit resulting from the expenditure of public funds. (Those public benefits are

explored more fully in the public purpose discussion below). This criteria was stressed by the Attorney General as a basis for upholding a similar financial arrangement. 35 Op. Att'y Gen. 1185 (1972).

The money raised by the Downtown Development District tax and budgeted to the Downtown Development Fund can be characterized as a financial arrangement which involves no additional risk to taxpayers and which results in benefits to the public. Accordingly this financial relationship is not in conflict with Article XI, §9. The city is neither raising money for, or in aid of, downtown businesses within the meaning of Article XI, §9.

However, even if the D.D.D. program surmounts the obstacle of Article XI,

§9 it must nevertheless overcome the objection that the plan is invalid because the tax revenues are not expended for a public purpose. (Although the Attorney General opinion cited above seems to merge the Article XI, §9 issue with the public and, therefore, a proper object of municipal expenditures and a private purpose, which is an improper object to which to devote public money, is whether the expenditures are sufficiently beneficial to the community as a whole to justify governmental involvement. Carruthers, supra, at 341; Miles v. City of Eugene, 252 Or 528, 532 (1969).

The determination of whether a particular expenditure is for a public purpose is essentially a legislative function and courts must give considerable deference to that determination.

A court should invalidate expenditures only where reasonable persons could not differ as to their lack of social utility. Carruthers, supra, at 341; Miles, supra, at 532.

In the present cases it can hardly be said that reasonable persons could not differ on the question of whether there is some social utility or some general benefit to the community resulting from the expenditures for the free parking program and for advertising and promotional efforts of the downtown area. Witnesses, including members of the city council, testified regarding their beliefs that these expenditures would benefit the entire Eugene area by helping to revitalize the D.D.D. and prevent deterioration of the urban core area. (Tr. 120-122, 144-146, 198-203). The

Oregon Supreme Court has recognized that a general benefit to the economy of the community is a public purpose. Carruthers, supra, at 341. It is reasonable to believe that the expenditure of the funds raised by the D.D.D. tax will result in a benefit to the community's economy. Thus a valid public purpose exists for the challenged expenditures.

Moreover, if an expenditure is primarily for a public purpose it can incidentally be of private benefit. 64 C.J.S. Municipal Corporations §1835 (1950). If there is a substantial public benefit, the plan is not invalidated merely because some private purpose is also served. Carruthers, supra, at 341. Thus even if certain benefits accrue to some private entities, such as downtown businesses, the expenditures would still

be for a public purpose.

g. tax imposed on one district for the benefit of another

The claim is made that the city has unlawfully imposed a tax one one district for the sole benefit of another district. The argument is that although D.D.D. businessmen, professionals and property owners are required to provide the entire financial support for the free parking program, those people comprise the group that is forbidden to utilize the free parking areas. Thus the Downtown Development District is taxed for the sole benefit of a different district, that district consisting of the city of Eugene outside the D.D.D. boundaries.

The proponents of the above argument concede that it is not predicated on any constitutional provision, nor any

directly applicable case law. However, those challenging the tax analogize the present situation to cases involving other types of taxing districts, such as school, water or drainage districts. It is asserted that these cases support the proposition that one taxing unit cannot be taxed for the benefit of another district. 71 Am Jur 2d. State and Local Taxation §66 (1973). Accepting, arguendo, the suggested analogy the argument must nevertheless fail. The cases cited to support the rule upon which this argument is based speak in terms of exclusive benefit to the nontaxed district. Morton Salt Co. v. City of South Hutchison, 159 F 2d 897 (10th Cir. 1947); Peterson v. Hancock, 54 NW 2d 85 (Neb. 1952); Reeves v. Buncome County, 167 SE 452 (N.C. 1933). A correct statement of the law is that one

taxing unit cannot be taxed for the exclusive benefit of another district.

The inquiry focuses upon whether the D.D.D. receives any benefit from the tax. This question was considered above, with regard to the equal protection and uniformity of taxation issues. It was concluded that the D.D.D. does receive benefits from the free parking program and other promotional activities that are financed by the tax. These benefits include increased business revenues, heightened property values and restoration of economic and cultural vitality in the urban core area. The benefits necessary to sustain the validity of a tax may be indirect and intangible. Even if they are not available to a particular taxpayer, it is sufficient if they redound to the benefit of the whole community

of which he is a part. Morton Salt Co., supra, at 903.

Since the Downtown Development District derives benefits from the tax revenues we are not presented with a situation in which one district is taxed for the sole benefit of another. Therefore the challenge considered herein must be rejected.

h. shifting or overpark assessment

The Eugene 10th and Oak overpark was constructed pursuant to Oregon statutes regulating municipal off-street parking facilities. ORS 223.805-223.845. The overpark was financed by a special assessment district whereby assessments were levied against property benefit by the structure in proportion to the benefit derived. (Exhibit 4). This method of

of financing is approved in ORS 223.825 (2). It is contended that the D.D.D. tax improperly shifts and dilutes the overpark assessment tax from the members of the original special assessment district to all those within the scope of the D.D.D. tax. The parties challenging the tax state in their brief that when the Downtown Development District was created the assessment district was dissolved and the assessment form of taxation replaced by the D.D.D. taxing scheme. This statement of facts appears to be inaccurate. A provision of the city code enacted along with the D.D.D. enabling legislation provides that taxpayers in the Overpark Assessment District shall receive credit for assessments paid to that district in the computation of their D.D.D. tax liability. Eugene Code, 1971 §3.710.

Other sections of the Eugene Code specify the methods for computing that credit. Eugene Code, 1971 §§3.755-3.765.

The position of the parties challenging the D.D.D. tax appears to be that once a particular mode of taxation is selected, the tax burdens cannot thereafter be altered. The difficulty with that position is that the power of apportioning to each individual his share of the tax burden is vested exclusively in the legislature. 71 Am Jur 2d State and Local Taxation §71 (1973).

The city council of Eugene thus may alter a mode of taxation, even if such an action results in a shifting of the tax burden from certain individuals to others. The city chose initially to fund the overpark by special assessments, but the city is not precluded from

changing that method, either to another means specified in ORS 223.825 or to a wholly distinct method. Had the city chosen to do so it could have dissolved and liquidated the assessment district and adopted an entirely different method of financing that facility. State ex rel Allen v. Martin, 255 Or 401, 410 (1970).

i. privilege against self-incrimination

All persons subject to the D.D.D. tax are required to keep available and open to inspection by the Eugene Department of Finance all accounts and books that are necessary or convenient for ascertaining tax liability. Eugene Code, 1971 §3.715. The penalty for non-compliance is a fine not to exceed $500. Eugene Code, 1971 §3.995. The parties challenging the D.D.D. ordinances contend

that such required disclosures violate their privilege against self-incrimination. "No person...shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend V.

The right of a witness not to give incriminating answers comes within the Fifth Amendment protections. That right is not limited to criminal prosecutions. It applies both to criminal and civil proceedings, whenever the answer to a question put to a witness might tend to subject him to criminal responsibility. 81 Am Jur Witnesses §32 (1976).

There is some question whether merely requiring a taxpayer to allow inspection of records is a proceeding within the scope of the constitutional privilege. But that issue need not be decided since the right of both state and federal

taxing authorities to compel production of books and records relevant to the establishment of an individual's tax liability has long been held to be free from constitutional impediment. Warren v. Board of Appeals, Md. Dept. of Emp. Sec., 172 A. 2d 124, 130 (Md. 1961); Annot., 103 ALR 522 (1936) and cases cited therein. In the leading case of Gange Lumber Co. v. Henneford, 53 P 2d 743 (Wash. 1936), the court held that a statute granting to taxing agencies the authority to inspect or require the production of a taxpayer's records for taxation purposes was not objectionable as compelling one to produce evidence against himself in a criminal proceeding.

Under the authorities referred to above the disclosures required by §3.751 of the Eugene Code, 1971 do not

violate the privilege against self-incrimination.

IV. Validity of the parking provisions of the D.D.D. program

a. void for vagueness

It is contended that the parking regulation is unconstitutionally vague because one is not given sufficient notice of the manner in which he may violate the ordinance. This claim is predicated on the due process clause of the Fourteenth Amendment. The degree of precision required by that provision varies, depending upon whether or not a regulation is categorized as a criminal statute. Palen v. State Bd. Higher Education, 18 Or. App. 442, 446 (1974). Therefore the initial inquiry is whether Eugene Code, 1971, §5.232, which is the object of the vague-

ness attack, is a criminal ordinance. That section does not itself prescribe penalties for its violation. But §5.990 (3) provides that violation of §5.232 is punishable by a fine not to exceed $50. Since violation of the parking regulation is punishable by a fine it can be classified as a criminal ordinance. Ex Parte Howe, 26 Or 181, 184 (1894).

The applicable test articulated by the Supreme Court of the United States is as follows:

> The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed. United States v. Harriss, 374 US 612, 617, 745. Ct. 808, 812 (1954).

That test has been reiterated several times since Harriss, most notably in Papachristou v. City of Jacksonville, 405 US 159, 92 S. Ct. 839 (1972).

The Oregon courts have expressed in similar terms the test for determining whether a statute is unconstitutionally vague.

> A statute which creates a new crime must express itself with clarity so that those who are about to engage in the conduct which it endeavors to prohibit may know by reading the statute that they will be subject to punishment if they proceed. Nothing less than that is required by the due process clause of the Fourteenth Amendment. The same clause renders invalid state penal laws which fail to set forth a standard with sufficient clarity so that those affected by them may know in advance whether or not their contemplated course of conduct will be lawful. The standard must be expressed with such clarity that persons of common intelligence, after reading the statute, will not be compelled to guess at its

> import or be unable to determine with reasonable certainty those to whom it is applicable. However, the standard need not be defined with such precision that those affected by it will never be required to hazard their freedom upon correctly foreseeing the manner in which a matter of degree may be resolved by a jury. State of Oregon v. Wojahn, 204 Or 84, 136-137 (1955); State v. Marker, 21 Or App 671, 673-674 (1975).

The same rules that govern the construction of statutes are applied to municipal ordinances. Lane County v. Heintz Const. Co., 228 Or 152, 157 (1961).

Under the standards set forth above the inquiry focuses on whether the challenged ordinance defines prohibited conduct with sufficient precision to enable persons of common intelligence to understand what is proscribed. The brief of the parties attacking the regulation suggests several possible grounds of potential misunderstanding or uncertainty

regarding the ordinance. Although some of the questions raised may have merit a statute is not void for vagueness merely because it does not set out in precise terms every possible violation. The courts have recognized that absolute certainty in defining prohibited conduct is not required. No more than a reasonable degree of certainty is demanded. Boyce Motor Lines v. United States, 342 U.S. 337, 72 S. Ct. 329, 331 (1952).

The challenged ordinance sets forth with specificity the persons to whom it applies: all employees, employers, residents and hotel or motel guests within the Downtown Development District. The ordinance uses the following language to prohibit those individuals from parking within the D.D.D. during specified time periods, "...[N]o such

person may, while in his place of employment, while in his residence, or while in such a hotel or motel, park a motor vehicle...." Eugene Code, 1971, §5.232.

Persons of common intelligence would not have to guess at the meaning of the ordinance. Such persons could understand in advance whether their contemplated conduct is forbidden. Moreover, where a challenged statute does not on its face appear to violate a constitutionally protected right a court should attempt to construe the statute so as to uphold its constitutionality. Some vagueness can be tolerated in criminal laws which do not trespass upon First Amendment freedoms. State v. Hodges, 253 Or 21, 26 (1969).

Statutes which define conduct in terms such as "unreasonable" have been

upheld. State v. Marker, 21 Or App 761 (1975); The People v. Raby, 240 N.E. 2d 595 (Ill. 1968). The ordinance challenged here is far more specific. The ordinance satisfies the definiteness test articulated by the Supreme Courts of both Oregon and the United States. It is not so vague and indefinite that it fails to satisfy the due process clause of the Fourteenth Amendment.

b. equal protection

It is also alleged that the parking regulation violates the equal protection clause of the United States Constitution and the privileges and immunities provision in Article I, §20 of the Oregon Constitution. This attack is similar to the previously considered argument that the taxing provisions are in conflict with those constitutional

provisions. It is argued that the parking ordinance arbitrarily singles out for special treatment those who live, work, employ others or are hotel or motel guests in the Downtown Development District. By prohibiting those groups from parking within the D.D.D. the city has made a classification that is arbitrary and unreasonable.

The standards which guide the courts in determining questions of alleged unconstituional class legislation are the same under both the federal equal protection clause and the Oregon privileges and immunities provision. Plummer v. Donald M. Drake Co., 212 Or 430, 437 (1958). The classificatin made by the Eugene council must bear some rational relation to a legitimate governmental interest sought to be advanced by the

parking scheme. School Dist. No. 12 v. Wasco County, 270 Or 622, 629 (1974) (hereinafter cited as Wasco County). The initial inquiry is whether there is a legitimate governmental interest which the city sought to advance by the parking program. The city's objective was to revitalize the urban core area, clearly a legitimate concern for local government. The free parking program would contribute to that goal by encouraging people to utilize downtown businesses and services. (Tr. 101, 201-203).

The inquiry then focuses upon whether the parking prohibition imposed upon the groups enumerated in the ordinance has a rational relation to accomplishing the downtown rejuvenation. The city believed that if the specified groups were not excluded from the free parking

program the purpose of that program would be defeated because D.D.D. employees, employers, residents and hotel/motel guests would regularly occupy the bulk of the free parking spaces to the exclusion of consumers. (Tr. 311-314). An unsuccessful free parking program would have a detrimental effect on the city's efforts to prevent downtown economic and cultural deterioration. (Tr. 144-145, 201-203). Thus the parking prohibition has a rational relation to achieving the city's goal of downtown improvement.

It is immaterial that other, even preferable, alternatives may exist to achieve the revitalization of the urban core. Wasco County at 629. Hence the parking program is not invalid merely because other factors such as urban

renewal may contribute to reaching the city's objective.

Even if some inequities result from the classification it will be sustained unless the classification scheme is wholly irrational. A mere showing of discriminatory treatment is not sufficient to establish an injury of constitutional proportions. Wasco County at 630.

The court cannot say that imposing the parking prohibition only on the specified group was "wholly irrational" or "palpably arbitrary". Wasco County at 630; Plummer v. Donald M. Drake Co., supra, at 437. The classification has a rational relation to a legitimate governmental objective and must be upheld.

c. deprivation of property without due process of law

It is argued that the parking regulation ordinance unlawfully deprives the plaintiffs Jarvill and Lichty of property rights without due process of law, contrary to the Fourteenth Amendment of the United States Constitution. It should be noted that the brief submitted by the plaintiffs also argues that there is a taking of property without compensation, therefore the ordinance should be declared unconstitutional. The brief does not indicate the legal foundation for this contention. Presumably reliance is placed upon Article I, §18 of the Oregon Constitution which provides that private property shall not be taken for public use without just compensation. That issue is not raised by the pleadings and will not, therefore, be considered herein.

The thrust of the due process argument is that plaintiff Jarvill is denied access to his place of business, and plaintiff Lichty is denied the right of access to his property. Plaintiffs rely primarily on Lowell v. Pendleton Auto Co., 123 Or 383 (1927). That case said that an abutting owner has two types of rights in a highway: a public right which is enjoyed in common with all other citizens, and certain private rights which arise from ownership of property contiguous to the highway and which are not common to the public generally. Lowell, supra, at 396-397. Among these private rights is the abutting owner's right of reasonable access to his property. Lowell, supra, at 395, Morris v. City of Salem, 179 Or 666, 673 (1946).

It is difficult to find a deprivation,

or even a substantial impairment of the right of access. Property owners in the Downtown Development District are not denied access to their property. No barriers exist to prevent or hinder an individual from entering or leaving his property. Moreover, a property owner has only a right of reasonable access, and that right is subject to the right of the public Ail v. City of Portland, 136 Or 654, 655 (1931).

Admittedly the ability of D.D.D. property owners to park in front of their property is restricted by the challenged ordinance. Plaintiffs argue that because their freedom to park is impaired they are deprived of their right of access. However, the Oregon Supreme Court has distinguished the right of access from the right to park

in a public street. Parking is among the category of public rights referred to in Lowell. The right to park in a public street is not a right incident to the ownership of abutting land. It is incident to the use of the street for travel and is shared by the abutting property owner in common with all other members of the traveling public. Brown v. Jackson, 268 Or 111, 113 (1974). The right of an abutting property owner to park in a public street adjoining his property is subject to reasonable regulation. 7 Am Jur 2d Automobiles and Highway Traffic, §241 (1963). It has been said by the Oregon court that parking is not a right, but a privilege and is subject to reasonable regulation under the police power. Hickey v. Riley, 177 Or 321, 332 (1945).

Thus a city may enact reasonable regulations regarding the privilege to park on public streets. Such regulations are not a denial of an abutting property owner's right of reasonable access. They do not constitute a deprivation of property rights, even if restrictions are imposed on the freedom of an abutting property owner to park vehicles. The D.D.D. parking ordinance is not so arbitrary or burdensome as to be unreasonable. If the people prohibited from parking in the D.D.D. were allowed to park without restrictions the purpose of the free parking program would be defeated. (Tr. 311-314). Thus the selection of the classes which come within the ambit of the ordinance has a reasonable basis. Moreover, the ordinance does not impose an absolute prohibition

on those individuals. (See discussion of the right to travel issue for further elaboration of this point.) The ordinance is a reasonable regulation of the privilege to park on public streets. It does not deprive the plaintiffs of any property right. Hence it does not violate the due process clause of the Fourteenth Amendment.

d. right of travel

A contention that is closely related to the due process issue is the claim that the parking ordinance constitutes an unconstitutional infringement upon the right to travel of the parties challenging the D.D.D. scheme. The right to travel is a firmly established fundamental right although it has no explicit mention in the United States Constitution, nor has the Supreme Court

ascribed its source to a particular constitutional provision. Shapiro v. Thompson, 394 U.S. 618, 89 S. Ct. 1322, 1329 (1969). However, it is not an unqualified right. Citizens are free to travel uninhibited by statutes, rules or regulations which unreasonably burden or restrict such movement. Shapiro, supra, at 1329 (emphasis added). By implication statutes and ordinances may impose some limitations on the freedom to travel, as long as those restrictions are not unreasonable. Shapiro, supra; Annot., 27 L Ed 2d 862 §4 (1971).

The parties challenging the parking regulation argue that it is an unreasonable restriction on the freedom to travel of those within the scope of the ordinance. However, the ordinance does not impose an absolute prohibition on

parking within the D.D.D. It prohibits D.D.D. employees, employers, residents and hotel/motel guests from parking in the free parking spaces between 9:00 a.m. and 6:00 p.m., Monday through Saturday. During the other hours of those days and on Sundays they may park in those spaces. Moreover, they may park in those locations at any time if they do so while engaging in activities not within the scope of the regulation. For example, a resident of the D.D.D. could park in the free spaces while he is shopping or utilizing professional services. He is forbidden to park in the proscribed areas only while in his residence.

Even within the specified time periods those covered by the ordinance are not prevented from traveling within the D.D.D. Neither are they substantially

hindered in such movement. They merely are precluded from using the free parking spaces. They can utilize the parking spaces within the District that are not part of the free parking program, but are available on a rental basis. (Tr. 178, 181). They can also employ any other mode of transportation. The parking ordinance does not unreasonably restrict the right to travel.

V. Other bases for challenging the program

a. Motor Vehicle Parking Facilities Act

The parties challenging the D.D.D. program contend that the parking scheme is contrary to the Motor Vehicle Parking Facilities Act (ORS 223.805-223.845). A question exists as to whether this issue is properly raised by the pleadings.

There is no specific allegation regarding the Motor Vehicle Parking Facilities Act. However, the complaints in both the Jarvill and Lichty cases contain an allegation that the D.D.D. was unlawfully created. (Paragraph VI, subparagraph 3 of Second Amended Complaint in both 74-2507 and 74-2508). The issue is deemed to be properly before the court under the general allegation that the D.D.D. was unlawfully created.

The argument is that the parking program is inconsistent with the scheme set forth in ORS 223.805-223.845 and that those statutes have precedence over conflicting local ordinances. It is contended that the D.D.D. parking program fails to comport with the M.V.P.F. Act in three respects. The first attack is based upon ORS 223.825(2) which provides

that municipal off-street parking facilities may be financed by special assessments levied in proportion to the benefit derived. It is asserted that special assessment is the only method of taxing property to finance off-street parking, since neither the D.D.D. taxes is a special assessment the taxes are invalid. However, a city may finance parking facilities by any one or any combination of the methods listed in ORS 223.825. A special assessment is not the only permissable means of funding such a project.

Secondly, it is noted that the Act permits a municipality to establish parking facilities for the general use and benefit of the people of the city. ORS 223.810. It is contended that this provision is violated as several categories

of individuals are prohibited from utilizing the free parking areas, therefore the parking facilities are not for general use and benefit.

The third attack is predicated on ORS 223.825(8) which provides that a business-occupation fee may be imposed to finance municipal parking facilities. The proceeds of such a fee must be used solely for the purposes of the M.V.P.F. Act. It is asserted that this statute is violated in that some of the funds raised by the D.D.D. business-occupation tax are used for advertising and for maintaining on-street parking on a free basis.

The latter two contentions cannot be disposed of as readily as the first one. The M.V.P.F. Act says a city may establish off-street parking facilities. In doing

so a city may proceed as provided in the Act. ORS 223.810. The word "may" ordinarily implies permissive or discretionary action. In Re People's Utility District, 160 Or 530, 543 (1939). The statute can be read to indicate that although a city may establish parking facilities pursuant to ORS 223.805-223.845 it may instead employ some other method. Thus the city is not required to conform its parking program to ORS 223.805-223.845 and any non-compliance with that act does not render the D.D.D. scheme invalid.

However, if necessary to carry out the intention of the legislature a court will construe the word "may" to mean "shall". Dilger v. School District 24 CJ, 222 Or 180, 117 (1960). The essential question is whether the

legislature intended the M.V.P.F. Act to be the sole method whereby a city can establ.sh and finance off-street parking facilities. If so, then the word "may" is to be construed as meaning "shall" so ORS 223.810 would read in effect: if a city establishes off-street parking facilities it shall proceed as provided in the Act. Under this approach the D.D.D. program may be invalid if it conflicts with the Act in the two respects discussed above.

It seems doubtful that the legislature intended the Act as the exclusive method by which a municipality can establish off-street parking facilities. The first sentence of ORS 223.810 says a city may establish such facilities. This use of "may" is discretionary language, clearly a city is not required

to establish parking facilities. The second sentence of the statute states that a city may proceed as provided in the Act. It is likely that the legislature intended the word "may" to have its customary discretionary meaning in the second sentence as well as the first.

This construction does not thwart the purpose of the statute. The Act grants certain powers to municipalities for the purpose of promulgating and financing parking facilities. But it does not preclude a city from enacting a parking program by some method not specified in the M.V.P.F. Act. A city may proceed as provided in the Act or it may proceed in any other lawful manner. Thus the Eugene City Council was not required to adhere rigidly to the provisions of ORS 223.805-223.845. The

council was free to select whatever mechanism is found appropriate to establish and maintain off-street parking facilities.

b. ORS 221.480-221.500

It is contended that the D.D.D. expenditures for advertising and promotion are contrary to ORS 221.480-221.500. But no explicit reference to this issue is contained in the pleadings. Moreover, it does not appear that this contention can be raised under the allegation in the complaints that the D.D.D. was unlawfully created. The argument that the D.D.D. advertising and promotional expenditures are illegal focuses on the operation of the D.D.D. program rather than the legality of the District's formation. The D.D.D. could be lawfully created but could nevertheless be acting improperly with

regard to its advertising expenditures. Since this challenge does not go to the validity of the District's existence it cannot be raised under the "unlawfully created" allegations. As the issue is not raised elsewhere in the pleadings it is not properly before the court and will not be considered herein.

CONCLUSION

With regard to each of the constitutional challenges advanced it should be stressed that a statute is presumed to be constitutional. All doubt should be resolved in favor of its constitutionality. In Re People's Utility District, 160 Or 530, 542 (1939). The same rules that govern the construction of statutes are applied to ordinances. Local 1724 B v. Bd. of Cty. Co., Lane Cty., 5 Or App 81, 84 (1971).

This presumption of constitutionality further buttresses the conclusions reached above in anlyzing each issue. All of the constitutional, common law and statutory based challenges have been given careful consideration. Each must be rejected. The Downtown Development District ordinances are valid.

Dated this 26th day of April, 1977.

/s/ F. Gordon Cottrell
Circuit Judge

C. Opinion of the Oregon Court of Appeals.

No. 256—May 14, 1979

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In Banc

JARVILL, *Appellant,*
v.
CITY OF EUGENE et al, *Respondents.*
(No. 74-2507, CA 8516)

LICHTY, *Appellant,*
v.
CITY OF EUGENE et al, *Respondents.*
(No. 74-2508, CA 8516)

CITY OF EUGENE, *Respondent,*
v.
GREAT WESTERN SCHISM, INC., *Appellant.*
(No. 75-3369, CA 8516)
(cases consolidated)

Appeal from Circuit Court, Lane County.

F. Gordon Cottrell, Judge.

Argued and submitted December 19, 1977. Resubmitted in banc May 8, 1979.

Larry R. Roloff, Eugene, argued the cause and filed the briefs for appellants.

Orval Etter, Eugene, argued the cause for respondents. With him on the briefs were Leslie M. Swanson, Jr., and Johnson, Harrang & Mercer, Eugene.

James A. Redden, Attorney General, and Ira W. Jones, Senior Assistant Attorney General, Salem, filed a brief amicus curiae on behalf of the Oregon Department of Revenue.

TANZER, J.

Affirmed in part; reversed in part.

Buttler, J., filed a dissenting opinion.

Joseph, J., filed a dissenting opinion.

TANZER, J.

Appellants in these three consolidated cases[1] challenge a charter provision and certain ordinances of the City of Eugene. The trial court upheld them all. We hold that the trial court lacked jurisdiction over the appellants' challenges to certain provisions imposing or relating to ad valorem property taxes, and we vacate the portions of the order which relate to those provisions. In all other respects, we affirm.

The Eugene City Charter was amended in 1973 to confer upon the common council of the city the powers

> "To establish, and from time to time to change the boundaries of, a downtown development district; for purposes of public parking facilities for vehicles in the district, of public transportation in, to, and from the district, and of economic promotion and development for the district, to tax persons, property, and economic enterprise in the district; and to establish one or more agencies to assist the city in the exercise of those powers." Eugene City Charter, ch VII, § 48(70) (1973).

Pursuant to that charter provision, the council enacted a series of ordinances, establishing a Downtown Development District (District) in the central business area of the city, regulating automobile parking in the District, and imposing taxes. The objective of that legislation is to enable the city to finance and administer a program of economic development and public parking in the area. Half the revenue for the program is generated by a tax on real property in the District; the other half comes, first, from a percentage tax on gross sales and receipts of "non-professional" persons doing business in the District, and, second, from a tax at a flat rate on "professionals" in the District.

[1] Appellants Jarvill and Lichty are plaintiffs in declaratory judgment proceedings. Appellant Great Western Schism is defendant in an action by the City of Eugene for collection of taxes levied under some of the ordinances challenged in the declaratory judgment actions. The city's property tax and other taxing ordinances, to be discussed below, are challenged in the Jarvill and Lichty cases; in the Great Western Schism case, the city's claim relates only to the taxes other than the property tax.

The parking regulations allow free parking generally in the District, but prohibit parking at most times by persons who are employed, employ others, reside, or are guests at hotels or motels within the District while such persons are in their place of employment, residence or lodging.

Appellants contend generally that the types of taxes imposed by the city are either unlawful or beyond the city's power to impose; that the imposition of the taxes on property and businesses within the District, when property and businesses in other parts of the city are not subject to similar taxation, violates the Uniformity Clause and Privileges and Immunities Clause of the Oregon Constitution (Art I, § 32 and Art I, § 20) as well as the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; and that the restrictions on the use of parking facilities by persons doing business or otherwise situated in the District also deny equal protection. The appellants advance numerous other arguments, which present less substantial questions.

Because appellants raise a scattershot pattern of contentions, our initial task is to separate the wheat from the chaff, with the expectation based more on faith than experience that some wheat may be found. *Cf. Neuberger v. City of Portland,* 37 Or App 13, 19, 586 P2d 351 (1978) *rev allowed* 1979. In this case, the appellants' challenges to the city's taxes present questions—not necessarily those articulated by the appellants—which bear significantly on municipal taxing power and on the meaning of the Uniformity Clause of the Oregon Constitution. We will deal first with the appellants' challenges to the District taxation scheme, and then address other issues.

DOWNTOWN DEVELOPMENT DISTRICT TAXATION

A. *Description of Taxation Scheme*

On July 19, 1973, the voters of Eugene approved a measure authorizing the common council to levy a "tax

on real property in the district, and not elsewhere in the city, of $129,250" in excess of the six percent limit prescribed by Art XI, § 11 of the Oregon Constitution. Pursuant to that voter authorization, the council levied an ad valorem property tax on the real property in the District.

In 1973, the city also enacted an ordinance imposing a tax of $40 quarterly on each self-employed professional doing business in the District, with an increment of $40 "for each natural person whom she or he employs," and imposing a tax of $2.50 per $1,000 of the gross retail sales and receipts of "each non-professional person * * * who engages in a business" in the District.

Each of the taxes falls exclusively on property or businesses within the District and has no application to property or businesses in other parts of the city. Appellants contend that, for that reason, each of the taxes violates the Uniformity Clause of the Oregon Constitution and the Equal Protection Clauses of the federal and state constitutions. Before the merits of those contentions can be reached, however, we note that there is a jurisdictional problem which the parties do not raise but which we nevertheless must resolve. *City of Hermiston v. ERB,* 280 Or 291, 570 P2d 663 (1977).

B. *Did the Circuit Court have Jurisdiction?*

The legislature has given exclusive jurisdiction for tax cases arising under state law to the Tax Court. As material, ORS 305.410 provides:

> "(1) Subject only to the provisions of ORS 305.445 relating to judicial review by the Supreme Court and to subsection (2) of this section, the tax court shall be the sole, exclusive and final judicial authority for the hearing and determination of all questions of law and fact arising under the tax laws of this state. * * *"
>
> "* * * * *
>
> "(3) Except as permitted under section 2, amended Article VII, Oregon Constitution, this section and

> ORS 305.445, no person shall contest, in any action, suit or proceeding in the circuit court or any other court, any matter within the jurisdiction of the tax court."

The procedural statutes for the contest of local taxes laid under state law are consistent with Tax Court sole jurisdiction. ORS 294.485 provides:

> "(1) Any tax levy made contrary to the provisions of ORS 294.305 to 294.520 or any other law relating to the making of tax levies shall be voidable as provided in subsection (2) of this section and ORS 310.070.
>
> "(2) The county assessor, county court, board of county commissioners, the Department of Revenue, Tax Supervising and Conservation Commission or 10 interested taxpayers may appeal to the Oregon Tax Court and such appeal shall be perfected in the following manner only:
>
> (a) Within 30 days after the notice of tax levy is filed with the county assessor, the appealing party shall file an original and two certified copies of a complaint with the clerk of the Oregon Tax Court at its principal office in Salem, Oregon. * * *"

Accordingly, under the clear terms of the relevant statutes, the circuit court could have had no jurisdiction to consider the validity of any of the city's taxes presenting questions "arising under the tax laws of this state."

The tax on professionals and the gross sales and receipts tax on nonprofessionals were enacted pursuant to the city's charter authority rather than under the tax laws of Oregon. *Davidson Baking Co. v. Jenkins, et al,* 216 Or 51, 337 P2d 352 (1959); *City of Idanha v. Consumers Power,* 8 Or App 551, 495 P2d 294 (1972). We therefore conclude that there was jurisdiction in the circuit court to resolve the questions relating to the validity of those taxes. *Cf. Girt et al v. Tri-Met et al,* 4 OTR 92 (1970).

The property taxes challenged by the appellants, however, were levied under the tax laws of this state.

Ad valorem property taxation in Oregon is comprehensively governed by state law. Or Const, Art IX, § 1; ORS chs 307-312. We therefore hold that the circuit court had no jurisdiction over the challenges to the District property taxes, and the portion of the judgment upholding the 2 property taxes must be vacated.[2]

This jurisdictional holding is arguably subject to question because of the superficial similarity Trans., 2 Or App 288, 467 P2d 671 *rev den* 256 Or 124, 471 P2d 798 (1970).[3] There, the plaintiffs challenged the legality of the formation of the Transportation District as well as the validity of a tax the Tri-Met board had imposed pursuant to the same act of the legislature which authorized Tri-Met's creation. Tri-Met contended that the circuit court and this court lacked jurisdiction because the case involved the validity of a tax authorized by state law. In rejecting that contention, we stated:

> "Several of the assignments of error relate to the constitutionality of the Act (ch 643) under which the District was formed; thus, the suit is broader in scope than an attack upon the tax alone, for it challenges the existence of the District. ORS 305.410 cannot be

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[2] The city argues in its brief

> "* * * that on April 14, 1975, the City Council converted the tax on real property to a tax on the ownership of real property, the conversion applying not only prospectively, but also retroactively to the beginning of the Downtown Development District program."

The last complaint challenging the validity of District property taxes in these cases was filed in October, 1974, six months before the city took the action to which its brief refers. Neither the fact that the "conversion" of the tax from an ad valorem real property tax to a tax on ownership occurred nor the fact that the change was retroactive is in the record. The city appends the April, 1975, "converting" ordinance as an exhibit to its brief, but it is not in evidence. We cannot consider it and we limit our review to the taxes levied for the 1973-1975 fiscal years.

It is therefore unnecessary for us to determine whether an ad valorem tax on ownership of real property is any less a tax arising under the laws of this state than is an ad valorem tax on real property. Whether that slender distinction creates either a jurisdictional or a substantive difference is not for us to decide in this case.

[3] *Horner's Market* was overruled in part in *Multnomah County v. Mittleman*, 275 Or 545, 552 P2d 242 (1976), but the holdings of *Horner's Market* which are relevant here were unaffected.

> construed to give the Tax Court original jurisdiction in such a matter, although the suit challenges a tax. The circuit court, being Oregon's court of original general jurisdiction, was, therefore, the proper tribunal in which to commence this suit * * *." 2 Or App at 293.

That passage points out the essential difference in rationale which makes the *Horner's Market* exception to exclusive Tax Court jurisdiction inapplicable to this case. The challenge in *Horner's Market* was to the creation and existence of the taxing district. The taxes were contended to be unlawful primarily because the taxing district that imposed them was itself unlawful. The underlying issue in that case was the validity of the taxing district itself, a proper subject for the invocation of equity jurisdiction in circuit court. If the challenge to the taxing district was resolved for petitioners, the taxes imposed by it necessarily fell. Thus, although tax law issues were also raised, the validity of the taxes was preliminarily and primarily a consequential issue cognizable after equity jurisdiction had been assumed.

In this case, unlike *Horner's Market,* there is no challenge to the validity of the taxing authority, the city. The City of Eugene has not created a separate political entity; the Downtown Development District is not a political subdivision and taxing authority like Tri-Met. It is simply an area in which certain ordinances apply. Plaintiffs' challenge is to a list of ordinances, some of which impose taxes and some of which regulate conduct. The challenge to the ordinances is not that the taxing authority is unlawful, but that the tax and regulatory ordinances are unlawful because the ordinances themselves purportedly violate state and federal law. The rationale of *Horner's Market* that "Equity, having taken jurisdiction, will decide all matters properly determinable in the suit,"[4]

[4] The reference to equity jurisdiction may have been misleading. ORS 305.410(1) regulates jurisdiction by subject matter. Expansive rules of equity jurisdiction are not relevant where jurisdiction is controlled by subject matter without regard to law/equity distinctions.

2 Or App at 293, does not apply to expand jurisdiction to those ordinances on the list which impose taxes under state law. Those ordinances are severable. Unlike *Horner's Market,* their validity is not dependent upon the resolution of non-tax issues of organic law which underlie all the ordinances. Hence, the equitable clean-up doctrine does not apply to transfer to the circuit court what would otherwise be the exclusive jurisdiction of the Tax Court over these taxing ordinances.

C. *Validity of District Tax on Professionals and District Gross Sales and Receipts Tax*

Appellants' principal arguments against the District tax on professionals and the tax on gross sales and receipts of nonprofessionals is that those taxes violate the Equal Protection Clauses of the United States and Oregon Constitutions (US Const, 14th Amend; Or Const, Art I, § 20), and the Uniformity Clause of the Oregon Constitution, (Art I, § 32). Article I, § 20 of the Oregon Constitution provides:

> "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

The section has generally been construed as being substantively identical to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *See, e.g., Tharalson v. State ex rel Dept. of Rev.,* 281 Or 9, 573 P2d 298 (1978).

The twofold thrust of appellants' equal protection argument is that the taxes arbitrarily discriminate against persons doing business within the District versus other citizens of Eugene, and that the taxes are discriminatory among those taxed in that different taxes fall on different persons within the District and impose different burdens which are unrelated to benefits. In their Uniformity Clause argument, the appellants repeat the same points and emphasize that the District taxes violate Art I, § 32 because they fall only

on persons and property within the District rather than applying throughout the city, and therefore entail a "geographical classification."

The Supreme Courts of Oregon and the United States have repeatedly held that a classification of subjects for taxation is not violative of equal protection if there is a rational basis for it, and that a rational basis will be found if there is any conceivable state of facts which will support the classification. The Oregon Supreme Court enunciated a test of the widest possible latitude and deference for resolving equal protection challenges to tax legislation in *Garbade and Boynton v. City of Portland,* 188 Or 158, 214 P2d 1000 (1950),[5] where it stated:

> "The contention made by plaintiffs that the tax imposed * * * is not uniform but is discriminatory * * * is answered adversely to their contention in *Carmichael v. Southern Coal Co.,* 301 U. S. 495, 81 L. Ed. 1245, 57 S. Ct. 868, which is one of the leading cases on the subject. The court there said:
>
> '* * * It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation. (Citing cases.) This Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption, infringe no constitutional limitation. (Citing many cases.)
>
> 'Like considerations govern exemptions from the operation of a tax imposed on the members of a class. A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it. (Citing cases.)
>
> 'This restriction upon the judicial function, in passing on the constitutionality of statutes, is not

[5] As with *Horner's Market,* a particular holding of *Garbade,* not relevant in this case, was overruled by the Supreme Court in *Multnomah County v. Mittleman, supra.*

> artificial or irrational. A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution. In the nature of the case it cannot record a complete catalogue of the considerations which move its members to enact laws. In the absence of such a record courts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action. Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.'
>
> "* * * * *
>
> "The uniformity exacted in the imposition of an excise tax is geographical, not intrinsic. Under the equal protection clauses of the state and federal constitutions the state is not confined 'to a formula of rigid uniformity in framing measures of taxation.' It 'may tax some kinds of property at one rate, and others at another, and exempt others altogether', and it 'may lay an excise on the operations of a particular kind of business, and exempt some other kind of business closely akin thereto.' *Steward Machine Co. v. Davis,* supra (301 U.S., at pp. 583, 584), and the cases therein cited. The above enunciated rules are applicable to municipalities." 188 Or 190-91, 192.

To the same effect, *see, e.g., Lehnhausen v. Lake Shore Auto Parts Co.,* 410 US 356, 93 S Ct 1001, 35 L Ed 2d 351 (1973); *Allied Stores of Ohio, v. Bowers,* 358 US 522, 79 S Ct 437, 3 L Ed 2d 480 (1959); *Huckaba v. Johnson,* 281 Or 23, 573 P2d 305 (1978); *Horner's Market v. Tri-County Trans., supra; Smith et al v. Columbia County et al,* 216 Or 662, 341 P2d 540 (1959) *appeal dismissed* 362 US 215 (1960); *Wittenberg et al v. Mutton et al,* 203 Or 438, 280 P2d 359 (1955); *Safeway Stores v. Portland,* 149 Or 581, 42 P2d 162 (1935); and *Standard Lbr. Co. v. Pierce et al.,* 112 Or 314, 228 P 812 (1924).

Tested against the foregoing principles, the tax differentiations between the flat rate tax on professionals and the gross receipts tax on nonprofessionals

within the District satisfies equal protection requirements.

As noted in *Garbade,* the similar but more difficult question is whether the city's taxes violate the Oregon constitutional requirement of territorial uniformity. Article I, § 32 of the Oregon Constitution provides:

> "* * * [A]ll taxation shall be uniform on the same class of subjects within the territorial limits of the authority levying the tax."

The Oregon Supreme Court has strongly suggested, albeit in dicta, that any geographical classification of subjects for taxation within the territorial limits of a taxing body is proscribed by Art I, § 32 whether or not there is a rational basis for that geographical classification. *See State ex rel. v. Malheur County Court,* 185 Or 392, 411, 203 P2d 305 (1949); *Standard Lbr. Co. v. Pierce et al., supra,* 112 Or at 335-36; and *Yamhill County v. Foster,* 53 Or 124, 130, 99 P 286 (1909). *See also* 16 McQuillin, Municipal Corporations, § 44.21 (1972).

Although these taxes fall upon persons or property within a definable geographical area, comprising less than all of the city's territory, the persons subject to the District taxes share more than a common geographical boundary. They are also likely to share common conditions of transportation, difficulty of access, scarcity of parking, density, degeneration of physical plant, loss of consumer patronage, esthetic depreciation, concentration of polluting agents, declining value and other conditions of modern life which characterize the downtown core area of many cities in Oregon and elsewhere. It is the economic and physical factors of contemporary urban life, not a boundary, which provide the rational basis for the taxes at issue. The constitutional question, therefore, is whether the selective imposition of a municipal tax for rational nongeographic purposes is invalid if a geographic boundary is drawn around the location of persons and businesses subject to the tax.

First we note that this situation is not unique. The law provides analogous instances of differential tax treatment of geographically identifiable land which shares nongeographic characteristics. For example, agricultural land is required to be bounded in exclusive farm use zones for land use purposes, ORS 308.370 et seq., and the land which is bounded within the zones is treated differently for property tax purposes than similar property outside the zones. The different tax treatment is based upon an economic classification; the boundary is simply an administrative means of identifying the land which is most likely to share the economic characteristics upon which the tax differentiation is based.[6] It is not conceivable that a classification based upon shared economic, *i.e.,* agricultural, characteristics is constitutionally impermissible because a geographic line is drawn around the property which is likely to share those characteristics.

The relevant language of Art I, § 32, provides that taxation shall be uniform "*on the same class of subjects* within the territorial limits of the authority levying the tax." The first phrase, which we italicized, recognizes the power of municipal bodies to classify, a power which we have already observed to be extremely broad. The nonitalicized phrase does not require absolute territorial uniformity, for that would prohibit any classification whatever within the territory. Rather it requires uniformity of treatment within the class throughout the territory. The obvious purpose of the phrase is to prevent the majority from shifting a heavier portion of the tax burden to a minority by tax-rate gerrymandering. Looking to both phrases of

[6] Similar situations might exist regarding historical or conservation areas or lands which adjoin physical phenomena such as rivers, lakes or scenic vantage points where differential tax treatment may be used to offset use restrictions or to otherwise promote public purposes associated with such historical, physical or esthetic conditions. In each of these analogous examples, classification upon economic, historical, esthetic or physical bases would probably not be stricken solely because the lands likely to share the characteristics upon which the classification is based are geographically identifiable.

the provision, it would appear that a classification for any lawful purpose would not be prohibited simply because it had cartographic effect, but that a classification based upon cartographic divisions by which a majority taxes a minority would be barred.

This conclusion is consistent with *Wittenberg et al v. Mutton et al, supra,* in which the Supreme Court held that equal protection was not denied by an occupation tax which was imposed at differential rates on local merchants and out-of-town merchants making deliveries within the city. Although the persons challenging the tax in that case did not attack it on Uniformity Clause grounds, the tax in *Wittenberg* was as much or as little a geographical one as the taxes here; there is no meaningful distinction, in determining whether a tax is geographically classified, between one which falls on everyone within a circle, as here, and one which falls on everyone outside a circle, as in *Wittenberg.* We decline to hold that the Uniformity Clause of the Oregon Constitution invalidates a tax which falls upon a rationally based nongeographic class simply because, in addition to that nongeographic classification, the incidence of the tax can also be located on a map.[7]

Appellants also argue that the City did not have the power to impose the District taxes. That argument is defeated by the decision of the Supreme Court in *Davidson Baking Co. v. Jenkins, et al,* 216 Or 51, 337 P2d 352 (1959), and the decision of this court in *City of Idanha v. Consumers Power,* 8 Or App 551, 495 P2d 294 (1972). In those cases, it was held that a general grant of powers in a city charter, like that contained in

[7] The analysis of the uniformity requirement in this opinion is based entirely upon the constitutional provision, Art I, § 32. We are aware of no statutory provision which would make any other uniformity requirements applicable to Eugene's professional or gross sales and receipts taxes. ORS 310.100 provides in pertinent part:

> "Each tax levied by any municipal corporation, taxing district or political subdivision shall apply to all the taxable property therein, as shown by the assessment roll last compiled by the assessor. * * *"

However, ORS 310.100 applies only to ad valorem property taxes.

the Eugene Charter, carries with it the power to impose revenue taxes.

As noted above, appellants make a number of arguments, in addition to their equal protection and uniformity contentions, against the District tax scheme. Some of these additional arguments are implicitly answered adversely to appellants in the foregoing discussion. The remaining arguments the appellants make against the taxes have either been answered adversely to them in numerous earlier cases, or do not warrant discussion.

RESTRICTIONS ON PARKING

Appellants assert that the City's restrictions upon parking by persons employed or lodged within the District are a denial of equal protection. As in the case of tax classifications, regulatory classifications which have a rational basis and bear a rational relationship to a legitimate governmental interest are valid. *School Dist. No. 12 v. Wasco County,* 270 Or 622, 629-30, 529 P2d 386 (1974); *Wittenberg et al v. Mutton et al., supra.* The standard of judicial review of such classifications is for minimal rationality. *Clackamas County v. Ague,* 27 Or App 515, 518, 556 P2d 1386 (1976) *rev den* (1977).

Rational bases for the parking programs and their attendant classifications are apparent. The free-parking program promotes revitalization of the central business district by encouraging consumers to use downtown facilities. A strategy of the program is to attract customers and clients who might not otherwise come downtown by providing free parking for them. The parking prohibitions are a reasonable means of preventing employees, employers, residents and hotel or motel guests within the District from regularly occupying free parking spaces to the exclusion of consumers and clients and thus defeating the strategy of the program. The barred class may be expected to be attracted downtown by employment or lodging requirements, *i.e.,* by conditions other than ease of

parking. Moreover, people who drive to work tend to park all day daily, whereas consumers tend to use parking space for less than all day everyday. Although many rational bases for the distinctions may readily be conceived, this obvious rationale is sufficient to demonstrate that the equal protection challenge is without substance. The restriction is a valid exercise of police power for a legitimate public purpose.

OTHER CONTENTIONS OF APPELLANTS

Appellants argue that the City had no authority to establish the District. We disagree. Authority was established by the charter amendment quoted early in this opinion. The power of the City to act pursuant to its charter in organizing its internal affairs and its governmental structure is conferred by Art XI, § 2, of the Oregon Constitution, and has often been expressly recognized by the Oregon appellate courts, most recently in *LaGrande/Astoria v. PERB,* 281 Or 137, 576 P2d 1204, 284 Or 173, 586 P2d 765 (1978).

Appellants also contend that the expenditures of the City for the District are for other than public purposes and that they violate Art XI, § 9, of the Oregon Constitution. We consider that the expenditures for the District program are manifestly for a public purpose and that appellants' argument is refuted by the Supreme Court's decision in *Carruthers v. Port of Astoria,* 249 Or 329, 438 P2d 725 (1968).

Appellants raise many other contentions with negligible substance (*e.g.,* the parking restrictions interfere with the constitutional right to free interstate travel; the reporting requirements require self-incrimination) which do not warrant public discussion.

CONCLUSION

We reverse that portion of the order relating to the District property tax. We affirm the trial court in all other respects.

Affirmed in part; reversed in part.

BUTTLER, J., dissenting.

Even though the majority makes a valiant effort to save a presumably desirable civic project, I must dissent because I can see no legal basis for avoiding the clear mandate of Art I, § 32, Oregon Constitution, which provides:

> "* * * All taxation shall be uniform on the same class of subjects within the territorial limits of the authority levying the tax."

The majority attempts to inject the rational basis test, which is valid for purposes of testing a classification under the Equal Protection Clause (Or Const, Art I, § 20; US Const, Amend XIV), into Art I, § 32, Oregon Constitution (slip opinion at 15). Doing so, however, does not dispense with the requirement that taxation shall be uniform "within the territorial limits of the authority levying the tax." Here, the city is the taxing authority, but these taxes are not on every professional, nonprofessional and property owner in the city, but only on those who do business or own property within a defined subterritory.

I agree with the majority's statement with respect to the requirement of territorial uniformity:

> "The obvious purpose of the phrase is to prevent the majority from shifting a heavier portion of the tax burden to a minority by tax rate gerrymandering." 40 Or App ___.

However, it seems clear to me that the effect of the taxes here involved is to do just that—a majority of the city residents have imposed a heavier tax burden on the minority within the subterritory. The fact that there is a rational basis for defining the subterritory is irrelevant under the constitutional provision. I would, therefore, reverse.

In addition, it is at least questionable whether the ad valorem tax imposed on real property in the subterritory by the original ordinance was a tax "arising under" state law (and therefore only to be challenged in the tax court), or whether the tax is

imposed under the authority of the city charter. I am inclined to think it is the latter and may be challenged in the circuit court. In any event, the amended ordinance taxing the ownership of real property is not such a tax on real property. There is a valid distinction between the two, and the distinction makes a difference.

The fact that the tax on ownership of real property is measured by the value as shown on the tax assessor's rolls does not make it a real property tax. The burden of the tax is not on the property, but on the owner; it may be collected out of any assets of the owner, unlike a real property tax, which is a lien against the property assessed, and may be collected only out of that property; it does not become a lien automatically, as does the real property tax, and the property may be transferred free of it prior to the entry of a judgment against the owner.

For those reasons, I would include the original real property tax and the later tax on ownership of real property along with the other taxes in deciding that the tax scheme adopted by the city must fail under Art I, § 32, Oregon Constitution.

Therefore, I respectfully dissent.

JOSEPH, J., dissenting.

I join in so much of Judge Buttler's dissent as would hold the tax scheme of the City of Eugene to violate (patently) the Uniformity Clause. Also, I am more certain than he that the subject taxes do *not* arise under the state's tax laws and that the majority is in error in its jurisdictional holding. Because any tax measured by the value of property is a property tax, I disagree with the rest of the dissent. Finally, I note that the majority virtually ignores the violations of equal protection in a tax scheme that taxes specific persons and denies them all direct benefits of the program financed by the taxes. The taxes that stimu-

lated the American Revolution were less objectionable than that.

GILLETTE, J., joins in this dissent.

D. Oregon Supreme Court's Letter Denying Rehearing.

"July 3, 1980

Larry R. Roloff
Attorney at Law
834 Pearl Street
Eugene, OR 97401

Re: Jarvill vs. City of Eugene
SC 26299

Dear Mr. Roloff:

The Supreme Court on July 2, 1980, denied Petitioners' Petition for Rehearing in the above-entitled matter.

Very truly yours,

/s/ Marilyn Hartley

Marilyn Hartley
Supreme Court Calendar Clerk"

Letter from Supreme Court dated July 3, 1980

APPENDIX II

Constitutional Provisions, Statutes and Ordinances

A. 14th Amendment, United States Constitution.

The Constitution of the United States, Amendment XIV, Section 1

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

B. Oregon Constitution, Article I, Section 32.

Oregon Constitution, Article I, §32.

"Taxes and duties; uniformity of taxation.

No tax or duty shall be imposed without the consent of the people or their representatives in the Legislative Assembly; and all taxation shall be uniform on the same class of subjects within the territorial limits of the authority levying the tax."

C. Eugene City Charter
Chapter VII, §48(70) (1973)

"To establish, and from time to time to change the boundaries of, a downtown development district; for purposes of public parking facilities for vehicles in the district, of public transportation in, to, and from the district, and of economic promotion and development for the district, to tax persons, property, and economic enterprise in the district; and to establish one or more agencies to assist the city in the exercise of those powers." Eugene City Charter, ch VII, §48(70) (1973)

D. Eugene Code.

D. The relevant sections of the Code of the City of Eugene provides:

> 2.380 Downtown Development District. For financing and admininstering in the central business district of the City of Eugene a program of economic promotion and development and a program of public parking for motor vehicles, that part of the city bounded by a line beginning at the intersection of the center line of 10th Avenue with the center line of Lincoln Street; and running thence north to the center line of 8th Avenue; thence easterly to the west line of lot 8 (if extended southerly) in block 8, Skinners Addition; thence north along said west line to the center of the east-west alley between 7th Avenue and 8th Avenue; thence east to the center of block 7, Skinners Addition; thence north 60 feet; thence east to the center line of Olive Street; thence north to the center line of 7th Avenue; thence east to the center of the north-south alley between Olive Street and Willamette Street; thence north to the center line of 6th Avenue; thence east to the center of the north-south alley between Willamette

Street and Oak Street; thence south to the center line of South Park Street; thence east to the center line of 8th Avenue; thence east to the center line of Pearl Street; thence south to the center line of 11th Avenue, thence west to the center of the north-south alley between Pearl Street and Oak Street; thence south to the north line of lot 6, block 2, Christian's Addition; thence west to the center line of Oak Street; thence north to the south line of lot 4 (if extended east), block 20, Mulligan's Donation; thence west to the center of the north-south alley between Oak Street and Pearl Street; thence south 120 feet; thence west to the center line of Willamette Street; thence north to the north line of lot 1 (if extended east), block A, Dorris Addition; thence west to the center of the north-south alley between Willamette Street and Olive Street; thence south to the center of the east-west alley between 11th Avenue and 12th Avenue; thence west to the center line of Olive Street; thence north to the center line of 11th Avenue; thence west to the center line of Charnelton Street; thence north to the center line of 10th Avenue; and thence west to the point of beginning, is hereby designated the Downtown Development District. [Section 2.380 added by Ordinance No. 16495, enacted May 31, 1972.]

2.381 Downtown Development Board - Establishment. For purposes of finance and administering in the Downtown Development District a program of economic promotion and development, public parking for vehicles and promotion of all modes of transportation, such as walking, bicycling, and public transit, an agency of the city to be known as the Downtown Development Board is hereby established. [Section 2.381 added by Ordinance No. 16506, enacted June 15, 1972.]

2.382 Downtown Development Board - Membership. The Downtown Development Board shall have eleven members, nine or more of whom shall each be the proprietor, manager, or assistant manager of a business with a situs in, carry on an occupation headquartered in, or own property in, the Downtown Development District, and as such represent the persons and property upon which at this time primarily rests the financial burden of the program mentioned in section 2.381 of this Code. The mayor shall appoint each initial member of the board in consultation with the Free Parking Committee of the Eugene Downtown Association. Subsequent members shall be nominated by the mayor and appointed by the council. In the appointments the board shall be made as broadly representative as possible of the various types of economic enterprise being carried on in the Downtown

Development District. [Section 2.382 added by Ordinance No. 16506, enacted June 15, 1972, and amended by Ordinance No. 18421, enacted June 20, 1979.]

2.383 Downtown Development Board - Term of Office. Of the initial members of the Downtown Development Board, four shall have terms of office running until January 1, 1976; four running until January 1, 1975; and three running until January 1, 1974. Members of the board other than the initial eleven shall each be appointed for terms beginning the first of the immediately ensuing year and running for three years, except that persons appointed to the board to fill vacancies left by members whose terms of the board have not expired shall have as their terms of office the unexpired terms of their immediate predecessors on the board. [Section 2.383 added by Ordinance No. 16506, enacted June 15, 1972.]

2.384 Downtown Development Board - Vacancies. An office on the Downtown Development Board shall become vacant upon its incumbent's death, resignation, or removal by the council, after consultation with the board, for the disability or inattention to the board's business. [Section 2.384 added by Ordinance No. 16506, enacted June 15, 1972, and amended by Ordinance No. 18421, enacted June 20, 1979.]

2.385 Downtown Development Board - Internal Organization, Proceedings. The mayor or his designee shall serve as chairman pro tem of the Downtown Development Board, until the board promulgates a plan for conduct of its meetings. The board shall effect whatever internal organization it deems best and shall adopt whatever rules of procedure it deems most expedient for conduct of its business. Meetings and other activities of the board and its officers and committes shall conform to the rules of the board. The board's plan of internal organization, its rules of procedure, and a record of its proceedings shall be reported to the mayor whenever he requests. [Section 2.385 added by Ordinance No. 16506, enacted June 15, 1972.]

2.386 Downtown Development Board - Meetings. The Downtown Development Board shall meet at least once each month at a time and place that it specifies at least three days in advance. The board may meet at other times in accordance with its rules. [Section 2.386 added by Ordinance No. 16506, enacted June 15, 1972.]

2.387 Downtown Development Board - Fiscal Duties. The Downtown Development Board shall have the following duties and the duties prescribed in section 2.388 of this Code:

(a) By March of each year the board shall prepare and submit to the department of finance a preliminary budget for the promotion, development, and parking program of the Downtown Development District for the immediately ensuing fiscal year. The budget shall estimate income and expenditures for the program for that year and be in a form prescribed by the department of finance.

(b) By April 1 of each year the board shall submit to the department of finance a written proposal of the rates of ad valorem and business-and-occupation taxation that the board deems necessary to finance the promotion, development, and parking program during the immediately ensuing fiscal year. [Section 2.387 added by Ordinance No. 16506, enacted June 15, 1972.]

2.388 Downtown Development Board - Grievances. Any person aggrieved by any action of the board shall first present his grievance in writing to the board within 30 days after the board's action. The board shall provide in its rules of procedure for receiving presentation of any such grievance, for gathering evidence and comments about it, for reviewing it, for responding to the aggrieved person about it, and for

making recommendations to the mayor and city manager about it. After receiving evidence and comments about the grievance and reviewing it, the board shall make a recommendation about it and report that recommendation to the aggrieved person. He, if not satisfied with the recommendation, within 10 days may lay his grievance before the city manager, by submitting to the manager a true copy of the board's recommendation, together with a written statement why he finds the recommendation unsatisfactory. He shall at the same time submit to the board a true copy of the statement. The board shall then submit its recommendation to the manager, together with whatever explanatory supplement the board deems advisable. The manager shall then conduct whatever investigation of the grievance he deems advisable and make a determination regarding its merits and whatever action regarding it he deems most appropriate. [Section 2.388 added by Ordinance No. 16506, enacted June 15, 1972.]

2.389 Downtown Development Fund. All proceeds from ad valorem and business-and-occupation taxes specially levied in the Downtown Development District to finance the program mentioned in section 2.381 of this Code, and all other income obtained by the Downtown Development Board, shall be credited to a fund known as the

Downtown Development Fund. The fund shall be expended exclusively to finance the program, in accordance with directions by the Downtown Development Board and with procedures prescribed by the department of finance. [Section 2.389 added by Ordinance No. 16506, enacted June 15, 1972.]

2.390 Downtown Development Board - Administrative Duties. Administration of the program mentioned in section 2.381 of this Code shall be the responsibility of the Downtown Development Board and be carried out within the constraints indicated elsewhere in this Code. The city manager, upon request from the board to fill specific positions for which funds are properly budgeted, and in accordance with applicable personnel policies and practices of the city, shall appoint personnel necessary for adminstration of the program. [Section 2.390 added by Ordinance No. 16506, enacted June 15, 1972.]

3.700 Downtown Development District Tax - Levy.

(1) Each professional who is not exempt under state law from municipal taxation and who engages in a profession, occupation, or business in the Downtown Development District during all or part of a quarter of a year shall pay to the city:

(a) If the professional is a self-employed natural

person, a tax of $40 for that quarter for that person and a tax of $40 for each natural person whom she or he employs during part or all of that quarter in the Downtown Development District as a professional employe.

(b) If the professional is a partnership, association, or corporation, a tax of $40 for that quarter for each professional member, professional stockholder, or professional employe in or of the partnership, association, or corporation in the Downtown Development District during part or all of that quarter.

(2) As used in this section the word "professional" includes generally all those engaged in a profession for private gain and includes particularly, but is not limited to, the following:

(a) Attorneys.
(b) Physicians.
(c) Surgeons.
(d) Dentists.
(e) Accountants.
(f) Engineers as defined by the laws of Oregon.
(g) Architects.
(h) Professional bondsmen.
(i) Contractors.
(j) Manufacturers' and corporation representatives not involved in retail sales.

(k) Auditors.
(l) Artists.
(m) Chiropodists.
(n) Chiropractors.
(o) Financial brokers.
(p) Lumber brokers.
(q) Financial consultants.
(r) Insurance consultants.
(s) Interior decorators.
(t) Investment advisors.
(u) Laboratory operators and technicians.
(v) Optometrists, opticians, and ophthalmologists.
(w) Orthopedists.
(x) Osteopaths.
(y) Planning consultants.
(z) Psychologists.
(aa) Psychiatrists.
(bb) Public relations consultants.
(cc) Real estate loan brokers.
(dd) Tax consultants.
(ee) Religious practitioners.
(ff) Industrial financing.

(3) Each nonprofessional person who is not exempt under state law from municipal taxation and who engages in a business in the Downtown Development District during part or all of a quarter of a year shall pay to the city for that quarter a tax of $2.50 per $1,000 of the gross retail sales and receipts from the business during that quarter, except that persons engaging in a business of a bank, a savings and loan association, or a consumer finance company shall

pay on the basis designated in subsections (4) and (5) of this section. A minimum tax of $10.00 shall be charged each quarter of a year for each business.

(4) Each person engaged in banking or a savings and loan association business in the Downtown Development District during part or all of a quarter of a year, shall pay to the city for that quarter a tax of $2.50 per $1,000 of one and three-quarters percent (.0175) of the total demand deposits, and of $2.50 per $1,000 of five-tenths of one percent (.005) of the total time deposits. Total time and demand deposits of banks shall be the total daily average deposits during that quarter as reported on the Federal Reserve Call; and total time deposits of savings and loan associations shall be the total daily average of all savings deposits during the quarter. Whenever savings and loan associations receive demand-type deposits, the tax rate on those deposits shall be $2.50 per $1,000 of one and three-quarters percent (.0175) of the daily average of those deposits during that quarter.

(5) Each person engaged in a consumer finance business in the Downtown Development District during part or all of a quarter of a year shall pay to the city for that quarter a tax of $2.50 per $1,000 of five percent (.05) of the total

principal balance of direct loans outstanding at the end of that quarter, excluding finance charges.

(6) Any person aggrieved by being erroneously classified in his opinion as a professional or non-professional for purposes of the tax imposed by this section may request the city manager to review the classification. Within 15 days after receiving the request, the city manager or his designee, after affording the person an opportunity to be heard with reference to his grievance, and after consulting with the finance officer and the Downtown Development Board, shall determine how the person shall be classified for purposes of the tax. Such determination shall be final.

(7) The tax imposed by this section is due and payable by the fifteenth day of the month immediately following the quarter to which the tax applies, and becomes delinquent if not paid on the last day of the month in which it becomes due. The date of the payment shall be the date of its personal delivery to the finance officer or his designee, or its postmark date, whichever is the earlier. The quarters to which the tax applies begin July 1, 1973 and every October 1, January 1, April 1, and July 1 thereafter. A professional may, by October 15 of the fiscal year, pay the entire tax he or she expects to owe during that year. A tax that becomes delinquent shall

be subject to penalty as provided in sections 3.730, 3.735, 3.740, and 3.745. [Section 3.700 added by Ordinance No. 16904, enacted August 13, 1973, amended by Ordinance No. 16939, enacted November 26, 1973, and Ordinance No. 17869, enacted February 28, 1977.]

3.705 Downtown Development District Tax - Gross Sales and Receipts. Within the meaning of section 3.700 of this Code, gross sales and receipts shall include the amounts recorded as earned when the books are kept on an accrual basis accounting, and the amounts recorded as collected when the books are kept on a cash basis accounting, and

(a) Include:

1. The total amount charged or received from sales, including sales to employes.

2. The total amount charged or received for the performance of acts, services, or employment of any nature, whether or not done incidentally to the sale of goods.

3. Any amount, commonly referred to as "trade-in value," for which a seller allows credit to a purchaser, without deduction for cost of property sold, cost of materials used, labor costs, or service costs.

(b) Do not include:

1. Any cash discount

allowed and taken by a purchaser.

2. Freight, delivery, or labor expenses of the purchaser paid by the seller and billed to the purchaser at cost.

3. Uncollectible balances on installment sales.

4. Sales on the basis of competitive bid to hotels, motels, medical institutions, apartment house owners or operators, building contractors, schools, governmental instrumentalities, or professional or business offices.

5. Sales of goods shipped from a point outside the state directly to the customer or to a common pick-up point.

6. Cash or credit allowed a purchaser on merchandise previously sold by the seller but returned by the purchaser because defective or otherwise unsatisfactory.

7. Any tax which by law is required to be collected from the purchaser by the seller on behalf of the taxing agency.

8. Sales of alcoholic beverages.

9. Sales of prepared food sold as part of a catered business and consumed off the premises by a congregated gathering of people.

[Section 3.750 added by Ordinance No. 16904, enacted August 13, 1973, and amended by Ordinance No. 17869, enacted February 28, 1977.]

3.710 Downtown Development District Tax - Credits. A person who is a bona fide owner-occupant of property in the Tenth and Oak Overpark Assessment District shall receive credit under sections 3.700 and 3.705 of this Code for all assessments which he pays to that district and for which he does not receive credit on his ad valorem tax levied by the city for purposes of the Downtown Development District. All credits allowed under this section shall constitute a debt to the Downtown Development District, to be repaid to the city on behalf of that district whenever refunds are due property owners in the assessment district. [Section 3.710 added by Ordinance No. 16904, enacted August 13, 1973.]

3.715 Downtown Development District Tax - Administration.

(1) The director of the department of finance shall administer the tax imposed by section 3.700 of this Code. He may do so in accordance with rules and regulations that he promulgates consistently with the Code. The rules and regulations shall include such provision as are necessary or expedient for eliciting information needed to administer the tax, inducing prompt and full payment

of the tax, prevent fraud or evasion related to the tax, affording subjects of the tax ample notice of their obligations regarding the tax, resolving administratively whatever controversies arise in administration of the tax, and imposing sanctions conducive to compliance with the rules and regulations. All such rules and regulations he shall promulgate in writing and make available to the public, after having first reviewed them with the Downtown Development Board.

(2) The director, himself or through assistants authorized to help him administer the tax, may obtain information necessary or convenient for administering the tax. Each person subject to the tax shall keep available and open to inspection by the director or any such assistant during regular office hours, all accounts and books necessary or convenient for ascertaining the person's tax liability under section 3.700.

(3) The director shall see that all information about gross sales and receipts, deposits, and loans that is furnished under subsection (2) of this section, and all information about the amount of any tax based on such sales and receipts, deposits, and loans is kept in strict confidence within the department and becomes known only to persons responsible for administering the tax. No person

may divulge any of the information to any other person than those just mentioned. [Section 3.715 added by Ordinance No. 16904, enacted August 13, 1973, amended by Ordinance No. 16954, enacted December 17, 1973, and Ordinance No. 17869, enacted February 28, 1977.]

3.720 Downtown Development District Tax - Security for Payment.

(1) Any amount due the city as a tax under section 3.700 or as a penalty under section 3.730, 3.735, 3.740, 3.745, or 3.996 of this Code shall constitute a debt of the person from whom the amount is due. The city may bring action in a court of competent jurisdiction to enforce payment of the debt.

(2) Any such amount may also, by declaration of the director of the department of finance be made a lien on the personal property of the person from whom the amount is due. The city may enforce payment of the amount by foreclosure of the lien in any manner authorized by law. [Section 3.720 added by Ordinance No. 16904, enacted August 13, 1973, and amended by Ordinance No. 17869, enacted February 28, 1977.]

3.996 Downtown Development District Tax - Penalties.

(1) Any person who fails to pay a tax as required by section 3.700 of this Code may be fined $50.00 per day so long as the failure continues.

(2) Any person who divulges confidential information in violation of section 3.715 of this Code shall be fined up to $500.00 and/or imprisoned up to 100 days. [Section 3.996 added by Ordinance No. 16904, enacted August 13, 1973.]

5.232 Prohibited Parking in Downtown Development District.

(1) The prohibitions on parking contained in this section apply in the Downtown Development District established by section 2.380 of this Code.

(2) This section applies to the following persons within that area enclosed and bordered by 4th Avenue, Patterson Street, 14th Avenue, and Jefferson Street:

(a) Those employed in the area.

(b) Those who employ others in the area.

(c) Those who reside in the area.

(d) Those registered as guests at hotels or motels in the area.

(3) Except on Sunday or holiday or under a monthly rental by the city, no such person may, while in his place of employment, while in his residence, or while in such a hotel or motel, park a motor vehicle between 9 a.m. and 6 p.m. on any day in an on-street or off-street parking place provided in the district by the city. [Section 5.232 added by Ordinance No. 16922, enacted October 8, 1973.]

5.233 Information for Control of Parking in Downtown Development District.

(1) Within ten days after this section takes effect; subsequently during the first five days of December of a year and during the first ten days of each quarter of a year; and, in case of a business, occupation, or profession being commenced within the Downtown Development District, within ten days after the commencement:

(a) An employer of a person employed part-time or full-time in the district shall furnish the city the full name of the employer and the employee.

(b) A person self-employed part-time or full-time in the district shall furnish the city his or her full name.

(2) The information required by this section shall be supplied in a mode and on forms prescribed by the traffic engineer of the city.

(3) No person who receives or has knowledge or possession of information required to be given by this section may divulge in any manner such information to any person not associated with the administration or enforcement of the parking program in the district. [Section 5.233 added by Ordinance No. 16922, enacted October 8, 1973; and amended by Ordinance No. 16959, enacted January 7, 1974.]

5.990 Penalties - Specific.

(1) Except as may be limited by Charter, violations of ORS provisions adopted by reference in section 5.005 of this Code are offenses against this city and are punishable to the same extent provided in the statutes.

(2) Violation of sections 5.060 to 5.155, 5.550 and 5.555, and 5.620 to 5.625 is punishable by fine not to exceed $100.00.

(3) Violation of sections 5.220 to 5.280 (except section 5.232 and subsection (3) of section 5.233), 5.305 to 5.315, 5.375, 5.395 to 5.525, or 5.705 is punishable by a fine not to exceed $50.00.

(4) Violation of sections 5.285, 5.565, 5.575, 5.580 or 5.585, shall be punishable by a fine not exceeding $25.00.

(5) In addition to or in lieu of a penalty for a bicycle violation, the municipal judge may prohibit the operation of a bicycle used in the violation on the streets of the city for a period not to exceed 30 days. In such event, the chief of police shall be directed to impound the bicycle and retain it for the period that the operation is prohibited, or the owner's registration card held for the period during which the operation of the bicycle is prohibited.

(6) Violation of subsection (3) of section 5.233 is punishable by a fine not to exceed $500.00 or

confinement in the county jail not to exceed 100 days, or both fine and imprisonment.

(7) Violation of section 5.232 is punishable by a fine not to exceed $200.00.

[Section 5.990 amended by Ordinance No. 16270, enacted July 12, 1971; Ordinance No. 16687, enacted January 8, 1973; Ordinance No. 16959, enacted January 7, 1974; Ordinance No. 17690, enacted June 28, 1976, and Ordinance No. 18554, enacted January 9, 1980.]

ORDINANCE NO. 16904

AN ORDINANCE TAXING BUSINESSES AND PROFESSIONS IN THE DOWNTWON DEVELOPMENT DISTRICT THAT ARE NOT EXEMPT UNDER STATE LAW FROM BUSINESS-OCCUPATION TAXES; ADDING TO THE EUGENE CODE, 1971 SECTIONS 3.700, 3.705, 3.710, 3.715, 3.720 AND 3.996; AND DECLARING AN EMERGENCY

WHEREAS, the central business district of the City of Eugene faces problems of automobile parking and of economic development that are peculiar to that district; and

WHEREAS, the City Council, in recognition of the unique character of those problems, and for the purpose of providing organizational resources for solving them, has established the Downtown Development District and the Downtown Development Board; and,

WHEREAS, the voters of the city have indicated at the city election July 19, 1973, that they desire free parking for automobiles in the Downtown Development District; and,

WHEREAS, the Downtown Development Board has recommended that 50 percent of the operating costs of the projected program of free parking and economic development in the Downtown Development District be raised by business-occupation taxation, now, therefore,

THE CITY OF EUGENE DOES ORDAIN AS FOLLOWS:

Section 1. The following new section is hereby added to the Eugene Code, 1971 and numbered 3.700:

3.700 Downtown Development District Tax - Levy.

(1) Each professional who is not exempt under state law from municipal taxation and who engages in a profession, occupation, or business in the Downtown Development District during all or part of a quarter of a year shall pay to the city:

(a) If the professional is a self-employed natural person, a tax of $40 for that quarter for that person and a tax of $40 for each natural person whom she or he employs during part or all of that quarter in the Downtown Development District as a professional employee.

(b) If the professional is a partnership, association, or corporation, a tax of $40 for that quarter for each professional member, professional stockholder, or professional employee in or of the partnership, association, or corporation in the Downtown Development District during part or all of that quarter.

(2) As used in this section the word "professional" includes generally all those engaged in a profession for private gain and includes particularly, but is not limited to, the following:

(a) Attorneys.
(b) Physicians.
(c) Surgeons.
(d) Dentists.
(e) Accountants.
(f) Engineers as defined by the laws of Oregon.
(g) Architects.
(h) Professional bondsmen.
(i) Contractors.
(j) Manufacturers' and corporation representatives not involved in retail sales.
(k) Auditors.
(l) Artists.
(m) Chiropodists.
(n) Chiropractors.
(o) Financial brokers.
(p) Lumber brokers.
(q) Financial consultants.
(r) Insurance consultants.
(s) Interior decorators.
(t) Investment advisors.
(u) Laboratory operators and technicians.
(v) Optometrists, opticians, and opthalmologists.
(w) Orthopedists.
(x) Osteopaths.
(y) Planning consultants.
(z) Psychologists.
(aa) Psychiatrists.

(bb) Public relations consultants.
(cc) Real estate loan brokers.
(dd) Tax consultants.
(ee) Religious practitioners.

(2) Each nonprofessional person who is not exempt under state law from municipal taxation and who engaged in a business in the Downtown Development District during part or all of a quarter of a year shall pay to the city for that quarter a tax of $2.50 per $1,000 of the gross retail sales and receipts from the business during that quarter.

(3) Any person aggrieved by being erroneously classified in his opinion as a professional or non-professional for purposes of the tax imposed by this section may request the city manager to review the classification. Within 15 days after receiving the request the city manager, or his designate, after affording the person an opportunity to be heard with reference to his grievance, and after consulting with the finance director and the Downtown Development Board, shall determine how the person shall be classified for purposes of the tax. Such determination shall be final.

(4) The tax imposed by this section shall be due and payable by the fifteenth day of the month immediately following the quarter to which the tax applies. The quarters to which the tax applies begin July 1, October 1, January 1, and April 1. A professional may, by October 15 of a fiscal year,

pay the entire tax expected to become due from her or him that year.

Section 2. The following new section is hereby added to the Eugene Code, 1971 and numbered 3.705:

3.705 Downtown Development District Tax - Gross Sales and Receipts. Within the meaning of Section 3.700 of this code, gross sales and receipts shall include the amounts recorded as earned when the books are kept on an accrual basis accounting, and the amounts recorded as collected when the books are kept on a cash basis accounting, and

(a) Include:

1. The total amount charged or received from sales, including sales to employees.

2. The total amount charged or received for the performance of acts, services, or employment of any nature, whether or not done incidentally to the sale of goods.

3. Any amount for which a seller allows credit to a purchaser, without deduction for cost of property sold, cost of materials used, labor costs, or service costs.

(b) Do not include:

1. Any cash discount allowed and taken by a purchaser.

2. Freight, delivery, or labor expenses of the

purchaser paid by seller and billed to the purchaser at cost.

3. Uncollectible balances on installment sales.

4. Sales on the basis of competitive bid to hotels, motels, medical institutions, apartment house owners or operators, building contractors, schools, governmental instrumentalities, or professional or business offices.

5. Sales of goods shipped from a point outside the state directly to the customer or to a common pick-up point.

6. Cash or credit allowed a purchaser on merchandise previously sold by the seller but returned by the purchaser because defective or otherwise unsatisfactory.

7. Any tax which by law is required to be collected from the purchaser by the seller on behalf of the taxing agency.

8. Sales of alcoholic beverages.

9. Sales of prepared food sold as part of a catered business and consumed off the premises by a congregated gathering of people.

Section 3. The following new section is hereby added to the Eugene Code, 1971 and numbered 3.710:

3.710 Downtown Development District Tax - Credits. A person who is a bona fide owner-occupant of property in the Tenth and Oak Overpark Assessment District shall receive credit under Section 3.700 and 3.705 of this Code for all assessments which he pays to that district and for which he does not receive credit on his ad valorem tax levied by the city for purposes of the Downtown Development District. All credits allowed under this section shall constitute a debt to the Downtown Development District, to be repaid to the city on behalf of that district whenever refunds are due property owners in the assessment district.

Section 4. The following new section is hereby added to the Eugene Code, 1971, and numbered 3.715:

3.715 Downtown Development District Tax - Administration.

(1) The director of the Department of Finance shall administer the tax imposed by Section 3.700 of this code. He may do so in accordance with rules and regulations that are consistent with the code and that he finds necessary or convenient for administration of the tax. All such rules and regulations he shall promulgate in writing and make available to the public, after having first reviewed them with the Downtown Development Board.

(2) The director, himself or through assistants authorized to help him administer the tax, may obtain information necessary or convenient for administering the tax. Each person subject to the tax shall keep available and open to inspection by the director or any such assistant during regular office hours, all accounts and books necessary or convenient for ascertaining the person's tax liability under Section 3.700.

(3) The director shall see that all information about gross sales and receipts which is furnished under subsection (2) of this section, and all information about the amount of any tax based on such sales and receipts is kept in strict confidence within the department and becomes known only to persons responsible for administering the tax. No person may divulge any of the information to any other person than those just mentioned.

Section 5. The following new section is hereby added to the Eugene Code, 1971, and numbered 3.720:

3.720 Downtown Development District Tax - Security for Payment.

(1) Any amount due the city as a tax imposed by Section 3.700 or as a penalty imposed under section 3.996 of this code shall constitute a debt of the person from whom the amount is due. The city may bring

action in a court of competent jurisdiction to enforce payment of the debt.

(2) Any such amount may also, by declaration of the director of the Department of Finance be made a lien on the personal property of the person from whom the amount is due. The city may enforce payment of the amount by foreclosure of the lien in any manner authorized by law.

Section 6. The following new section is hereby added to the Eugene Code, 1971 and numbered 3.996:

3.996 Downtown Development District Tax - Penalties

(1) Any person who fails to pay a tax as required by Section 3.700 of this Code may be fined $50 per day so long as the failure continues.

(2) Any person who divulges confidential information in violation of Section 3.715 of this code shall be fined up to $500 and/or imprisoned up to 100 days.

Section 7. That the provisions contained herein are necessary for the preservation of the peace, health, safety and welfare of the citizens of the City of Eugene and therefore, an emergency is declared to exist, and this ordinance shall become effective immediately upon its passage by the Common Council

and approval by the Mayor.

Passed by the Common Council
this 13th day of August, 1973

/s/
City Recorder

Approved by the Mayor this
13th day of August, 1973

/s/
Mayor

ORDINANCE NO. 16906

AN ORDINANCE ADOPTING THE BUDGET; MAKING APPROXIMATIONS AND DETERMINING AND LEVYING THE ANNUAL TAX LEVY FOR THE DOWNTOWN DEVELOPMENT DISTRICT ONLY OF THE CITY OF EUGENE FOR THE FISCAL YEAR BEGINNING JULY 1, 1973 AND ENDING JUNE 30, 1974; AND DECLARING AN EMERGENCY.

THE CITY OF EUGENE DOES ORDAIN AS FOLLOWS:

Section 1. That the budget for the Downtown Development District only of the City of Eugene, Oregon, for the year commencing July 1, 1973 and ending June 30, 1974, as shown herein, be, and the same is hereby adopted.

Section 2. That the Common Council of the City of Eugene, Oregon, does hereby make, estimate, determine and declare the amount of money necessary to be levied and raised by taxation for the purpose of paying all authorized demands for the development of the projected program of free parking and economic development in the Downtown Development District upon the Treasury of the City of Eugene, for the fiscal year beginning July 1, 1973 and ending June 30, 1974 and does hereby make appropriations as detailed and itemized herein, pursuant to the provisions and in the manner provided by law as follows:

Section 3. That of the total budget of $287,825, a levy of $129,500, which has been authorized in excess of the constitutional six percent limitation, be made against all taxable real property within the Downtown Development District only of the City of Eugene, for the purpose of deriving a portion of the funds necessary to implement the projected program of free parking in the Downtown Development District only for the fiscal year beginning July 1, 1973 and ending June 30, 1974. That the Recorder of said City is hereby directed to certify the said levies as herein made and set forth.

Section 4. That the provisions contained herein are necessary for the preservation of the peace, health, safety and welfare of the City of Eugene and therefore, an emergency is declared to exist, and this ordinance shall be in full force and effect from and after its passage by the Common Council and approval by the Major.

Passed by the Common Council
this 13th day of August, 1973

/s/
City Recorder

Approved by the Mayor this
13th day of August, 1973

/s/
Mayor

ORDINANCE NO. 16939

AN ORDINANCE CONCERNING TAXING BUSINESSES AND PROFESSIONALS IN THE DOWNTOWN DEVELOPMENT DISTRICT, AMENDING SUBSECTION (4) OF SECTION 3.700 AND SUBSECTION (1) OF SECTION 3.715 OF THE EUGENE CODE, 1971, AND DECLARING AN EMERGENCY.

THE CITY OF EUGENE DOES ORDAIN AS FOLLOWS:

Section 1. That subsection (4) of Section 3.700 of the Eugene Code, 1971 is amended to read:

3.700 (4) The tax imposed by this section shall be due and payable by the fifteenth day of the month immediately following the quarter to which the tax applies. The quarters to which the tax applies begin July 1, 1973, and every October 1, January 1, April 1 and July 1 thereafter. A professional may, by October 15 of a fiscal year, pay the entire tax expected to become due from her or him that year. A tax which hereafter becomes due and is not paid by the last day of the month in which it becomes due shall be delinquent and subject to penalty.

Section 3. That subsection (1) of Section 3.715 of the Eugene Code, 1971 is amended to read:

3.715 (1) The director of the department of finance shall

administer the tax imposed by Section 3.700 of this code. He may do so in accordance with rules and regulations that are consistent with the code and that he finds necessary or convenient for administration of the tax. The rules and regulations may prescribe interest and penalties. All such rules and regulations he shall promulgate in writing and make available to the public, after having first reviewed them with the Downtown Development Board.

Section 3. That the provisions contained herein are necessary for the preservation of the peace, health and safety of the City of Eugene and therefore, an emergency is declared to exist, and this ordinance shall become effective immediately upon its passage by the Common Council and approval by the Major.

Passed by the Common Council
this 26th day of November, 1973

/s/
City Recorder

Approved by the Mayor this
26th day of November, 1973

/s/
Mayor

Supreme Court, U.S.
FILED
NOV 3 1980
MICHAEL RODAK, JR., CLERK

NO. 80-520

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MICHAEL F. JARVILL,

Petitioner,

v.

THE CITY OF EUGENE,
ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

BRIEF FOR RESPONDENTS IN OPPOSITION

LESLIE M. SWANSON, JR.
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Attorney of Record for Respondents

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CONSTITUTION OF THE STATE OF OREGON

Article I, Section 32 4

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101 E. Broadway, Suite 400
Eugene, Oregon 97401

Attorney of Record for Respondents

I. STATEMENT OF THE CASE

The taxing system Petitioner attacks supports a free parking program for the central downtown district (The Downtown Development District) of the City of Eugene. The city, by ordinance, taxes professionals, businesses and property owners within the district to finance and administer this program.

The boundaries of the district were determined by economic and physical attributes of the downtown area and the property and businesses located there. The conditions and problems unique to the area include those relating to transportation, density, difficulty of access, declining value, loss of consumer patronage, aesthetic depreciation and degeneration of physical plant. The city's decision to tax those persons within the district to implement the free parking program for the district was rationally based.

II. SUMMARY OF ARGUMENT

The City's decision to tax persons within the Downtown Development District to support a free parking program for the district was reasonable. This Court should defer to this local, fiscal decision. No federal right, fundamental interest or suspect classification is involved and the rational basis test should be applied. Those persons to be taxed were reasonably determined by reference to common conditions and problems unique to the downtown core district and the fact that this group of persons is defined geographically does not render the classification unconstitutional. In fact, this taxing system has been determined to satisfy the more stringent uniformity requirements of the Oregon Constitution. The petition for certiorari should be denied.

III. ARGUMENT

A. There Is No Evidentiary Basis for Petitioner's Claim of Differential Treatment.

The trial court record is devoid of evidence establishing that persons outside the district in the same or similar circumstances as those inside the district are subjected to differential treatment. Defendants offered no such evidence

at trial and no such evidence exists. To the contrary, the trial record contains the testimony of expert and lay witnesses as well as documentary evidence establishing the circumstances which differentiate between professionals, businesses and property owners inside and outside of the District.

B. The City's Taxing Plan Meets the Rational Basis Test.

Nearly a century of Supreme Court adjudication has established the principle that a tax law will be upheld against an equal protection attack as long as its classification is "'founded upon a reasonable distinction.'" *Kahn v. Shevin,* 416 U.S. 351, 355, 94 S.Ct. 1734, 1737, 40 L.Ed.2d 189 (1974), *quoting Allied Stores v. Bowers,* 358 U.S. 522, 528, 79 S.Ct. 437, 441, 3 L.Ed.2d 480. The Court has long held and recently reiterated the rule that "'[w]here taxation is concerned and no specific federal right, apart from equal protection, is imperilled, the states have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.'" *Id. quoting Lehnhauser v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 359, 93 S.Ct. 1001, 1003, 35 L.Ed.2d 351 (1972).

Petitioner points to no fundamental interest or suspect classification which might call for strict scrutiny under the equal protection clause. For this reason and also because the Supreme Court has traditionally deferred to states to allow local development of fiscal policy, the applicable standard of review requires only that the taxing system be shown to bear some rational relationship to a legitimate purpose. *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 40, 93 S.Ct. 1278, 1300, 36 L.Ed.2d 16 (1973). In *Rodriguez,* the Court acknowledged that this long standing rule was well founded in that the court lacks "both the expertise and familiarity with local problems necessary to the making of wise decisions with respect to the raising and disposition of public revenues." *Id.* at 42, 93 S.Ct. at 1301.

Petitioner raises no issues which have not been long settled by this Court. The mere fact that this program affects only professionals, businesses and property owners in the downtown area of the city does not render it unconstitutional. In the recent case of *Holt Civic Club v. City of Tuscaloosa,* 439

U.S. 60, 99 S.Ct. 383, 390, 58 L.Ed.2d 292 (1978) where the Supreme Court decided that a city could enforce its ordinances outside its territory, the court reaffirmed its statement in the earlier case of *Fort Smith Light Co. v. Paving Dist.*, 274 U.S. 387, 391, 47 S.Ct. 595, 597, 71 L.Ed. 1112 (1927) that "the Fourteenth Amendment does not prohibit legislation merely because it is special, or limited in its application to a particular geographical or political subdivision of the state."

C. The City's Taxing Plan Meets the More Stringent State Constitutional Requirement of Uniformity.

Perhaps the most compelling reason for denying review in this case is that the Constitution of the State of Oregon contains a section, Article I, Section 32, that is more stringent than the equal protection clause of the Fourteenth Amendment regarding uniformity of taxation. That section reads:

> "No tax or duty shall be imposed without the consent of the people or their representatives in the legislative assembly; and all taxation shall be uniform on the same class of subjects within the territorial limits of the authority levying the tax."

The Oregon Supreme Court, the Oregon Court of Appeals and the trial judge who ruled in this case all found that this explicit requirement of the Oregon Constitution was met by the classifications in this case. Respondents have satisfied a state constitutional requirement that is more onerous than any imposed by the Fourteenth Amendment Equal Protection Clause.

D. Those Who Are Taxed Do Benefit from the Taxes They Pay.

The second question Petitioner presents for review misstates the facts in this case. The direct benefits of the taxes in question are enjoyed by all who park free in the district including those who are taxed. The only prohibition on those taxed is that they not be in their place of business, professional office or motel or hotel at the same time that their vehicle is parked free in the District. When they leave

their own premises they are free to park in the District along with others. In any event, it is not required that each taxpayer receive a special benefit for the tax imposed. *St. Louis and Southwest Railway v. Nattin*, 277 U.S. 157, 48 S.Ct. 438, 72 L.Ed. 830 (1928). *See, City of Pittsburgh v. Alco Parking Corporation*, 417 U.S. 369, 94 S.Ct. 2291, 41 L.Ed.2d 132 (1974) (tax on commercial parking lots to raise revenue because of traffic related problems upheld against equal protection and due process attacks).

E. Due Process Objections Were Not Raised Below Nor Do They Have Merit.

Petitioner did not raise the issue of whether he was deprived of property without an opportunity to vote in the Court below. Petition for Writ at 13-14. The facts stated by Petitioner establish that the taxpayer's representatives, the city council members, levied the tax. There is no constitutional requirement that citizens vote directly on every tax measure.

CONCLUSION

This case does not merit review by this Court. The tax law Petitioner seeks to have declared unconstitutional contains rational distinctions based upon conditions and problems unique to the downtown core district. No issue is raised which would differentiate this case from the myriad of cases in which local tax laws have been upheld against similar attacks for nearly a century. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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By: _____

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